

**MCILS**

**August 11, 2015  
Commissioner's Meeting  
Packet**

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MAINE COMMISSION ON INDIGENT LEGAL SERVICES

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AUGUST 11, 2015  
COMMISSION MEETING  
JUDICIARY COMMITTEE ROOM, STATEHOUSE, AUGUSTA  
AGENDA

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- 1) Approval of July 14, 2015 Commission Meeting Minutes
- 2) Operations Reports Review
- 3) Report on Attorney Performance Evaluations
- 4) Contracts Discussion
- 5) Public Comment
- 6) Set Date, Time and Location of Next Regular Meeting of the Commission
- 7) Executive Session, if needed (Closed to Public)

**(1.)**  
**July 14, 2015**  
**Commission Meeting**  
**Minutes**

**Maine Commission on Indigent Legal Services – Commissioners Meeting  
July 14<sup>th</sup>, 2015**

**Minutes**

**Commissioners Present:** Steven Carey, Marvin Glazier, William Logan, Kenneth Spier  
**MCLS Staff Present:** John Pelletier, Katherine MacRae

| <b>Agenda Item</b>   | <b>Discussion</b>  | <b>Outcome/Action Item/Responsible Party</b>   |
|--|--|--|
| Approval of the June 9, 2015 and July 1, 2015 Commission Meeting Minutes | Copy of minutes received by Commissioners. Commissioner Susan Roy not present. Commissioner Glazier arrived five minutes late.   | Commissioner Logan moved for the approval of the minutes. Commissioner Spier seconded. All Commissioners in attendance voted in favor. Approved. |
| Operations Reports Review  | Executive Director John Pelletier reviewed the June 2015 Operations Report. In June, 2,188 new cases were opened in the DefenderData system which was a 189 case increase from May. The number of electronically submitted vouchers was 2,709, a decrease of 79 vouchers from May, totaling \$1,450,103.70, an increase of \$99,000 over May. In June, we paid 3,170 electronic vouchers totaling \$1,680,952.85, representing a decrease of 130 vouchers, but an increase in \$111,000 in payments compared to May. There was one paper voucher submitted and paid in June totaling \$4,146.48 by retained counsel for representation on a State appeal in a criminal case. Recent statutory change made these payments a Commission responsibility. The average price per voucher in June was \$530.27, up \$54.74 per voucher over May. The year-end average was \$475.78, a 9.46% increase over the previous year that is almost entirely attributable to the 10% increase in the hourly rate. Commissioner Logan assumed there would be a trickle-up over time. Executive Director Pelletier stated that the impact is pretty immediate because most vouchers are submitted promptly. |  |

| Agenda Item | Discussion   | Outcome/Action Item/Responsible Party |
|-------------|--|---------------------------------------|
|             | <p>Executive Director Pelletier informed the Commission that Appeal and Post-Conviction Review cases had the highest average vouchers in June. There were 13 vouchers exceeding \$5,000 paid in June.</p> <p>Director Pelletier informed the Commission that the expenses for June in the "All Other Account" totaled \$1,626,279.66. Of the amount, just over \$11,000 was devoted to the Commission's operating expenses. The Commission ended the year with a carry-over balance of DefenderData vouchers totaling \$343,901, as compared to our carry-over target at the beginning on the fiscal year of \$536,528.</p> <p>In the Personal Services Account, there was \$51,406.31 in expenses for the month of June.</p> <p>In the Revenue Account, the monthly transfer from the Judicial Branch for counsel fees for the month of June, which reflects May's collections, totaled \$69,561.74, up \$1,200 over the previous month. <u>For the fiscal year, the Commission collected \$776,536 in total reimbursements, up from the previous year total of \$654,406, which had been the most collected by the Commission in its history.</u> The Commissioners wanted to express their congratulations to the Financial Screeners for their hard work and how well they are doing. Director Pelletier informed the Commission that he relayed their thoughts to the Financial Screeners during their annual meeting last Friday. Director Pelletier also reminded the Commission that because the financial order request to expand the allotment in the revenue account was not approved, we carried a cash balance of \$60,295.05 into the new fiscal year.</p> <p>In the Conference Account, the Commission collected registration fees for the June minimum standards trainings, and paid expenses related to those trainings. At the end of the fiscal year, the account balance stood at \$12,585.23. Commissioner Carey asked if Director Pelletier has considered any new trainings. Director Pelletier replied that he is considering conducting a civil commitment training session in Augusta around October, due to expressed interest by newly rostered attorneys.</p> |                                       |

| Agenda Item  | Discussion  | Outcome/Action Item/Responsible Party  |
|--|---|--|
| <p>Consideration of Initiating Rule-Making to Adopt a Permanent Fee Schedule Amendment Chapter 301</p> | <p>Director Pelletier informed the Commission that the Adopted Emergency Amendment was delivered on July 1<sup>st</sup>, 2015, and is currently effective. Commissioner Carey stated that there are a few math errors in this version but these errors do not impact the attorneys' hourly wage increase (math errors are in the cap figures). Director Pelletier informed the Commission that this emergency rule needs to be made permanent through the regular rule-making process and have a hearing open to public comment. The suggested date is at the next Commissioner meeting at 10:30 am on August 11, 2015. Commissioner Spirer was concerned to ensure that the new \$60/hour rate for attorneys would not be changed through the new rule-making process. Director Pelletier reaffirmed that this is a major substantive rule that is needed to make the emergency change to the hourly rate permanent and that requires provisional adoption through the standard rule-making process (open to public comments and hearing) before going to the Legislature next year.</p>   | <p>Commissioner Carey asked if there was a motion to approve holding a public comment hearing. Commissioner Glazier so moved. Commissioner Logan seconded. All Commissioners present in favor.</p> |
| <p>Consideration of Final Adoption of Approved Major Substantive Rule Amendment Chapter 2 LD 851</p>   | <p>Director Pelletier informed the Commission pursuant to Resolve, LD 851, the Legislature had approved the proposed amendment to <u>Chapter 2: Standards for Qualification of Assigned Counsel</u> with one minor change. Pursuant to Maine law, the agency promulgating a major substantive rule must vote for final adoption of the rule within 60 days of the effective date of legislation approving adoption of the rule. The change required by the Legislature was to change the word "promptly" to "within 5 days" with respect to the provision that attorneys report criminal charges. Director Pelletier stated that he believes the legislator who moved to pass the bill referred to "5 business days" but reiterated that the Commission should act soon to take final adoption. Commissioner Carey stated that the Legislature did not want any "wiggle" room indicated by the term "promptly" which is why they chose the "within 5 days" language instead. Commissioner Logan suggested that perhaps the date of filing of the complaint would be more accurate because the current language requires an attorney to routinely check with the court for any filings. Director Pelletier stated that this change occurred late in the session at the end of a long work day and, as the Executive Director, once made aware of any criminal charge, the Commission</p> | <p>Commissioner Carey asked for a motion to approve the LD 851. Commissioner Logan moved and Commissioner Glazier seconded. All Commissioners present in favor.</p>                                |

| Agenda Item                                    | Discussion  | Outcome/Action Item/Responsible Party |
|--|---|---------------------------------------|
| <p>Governor's Proposed Legislation LD 1433</p> | <p>could keep on top of it. Commissioner Carey and Director Pelletier both stated that the Director Pelletier could use his authority and that if an attorney, for example, notified MCILS within 6 days, the delay would not prompt discipline from the Executive Director so long as the delay is reasonable.</p> <p>Director Pelletier provided a side-by-side comparison, written by MCILS legal intern Katherine MacRae, which provides an informative and detailed analysis of the current statute and the proposed legislation. Director Pelletier also provided a copy of the ABA's Ten Principles for the Commission's consideration, noting that the Clifford Commission, which recommended the creation of MCILS, relied on the Ten Principles in providing the basis for the Commission's purposes.</p> <p>Commissioner Spurrer thanked Katherine MacRae for the comparison document and asked Director Pelletier what he thought the timetable for the bill would look like. Director Pelletier stated that the legislature comes back the first week of January and cautioned the Commission to be prepared in case the leadership sets a tight deadline 2-3 weeks into the session. Commissioner Logan stated that the Legislature will likely be in session until mid-March/April. Commissioner Carey also agrees with Director Pelletier about being prepared by January and recommends that by December, at the latest, MCILS develops a clear understanding and stance on the bill. Commissioner Carey also suggested a plan for the September meeting to focus on LD 1433. Commissioner Glazier stated that he is concerned about the \$5 application fee and Commissioner Carey asked if the application fee is even appropriate given that there will need to be a system in place to waive the fee and will likely create more work for the screeners. Director Pelletier introduced Katherine MacRae who stated that, based on her research and communication with NLADA, application fees have yet to be found unconstitutional and many states employ them. She also stated that LD1433 authorizes the court to collect the application fee but the bill does not indicate whether the fee goes to MCILS or the Office of the Public Defender.</p> <p>Commissioner Carey asked if Director Pelletier had any further ideas about contracts and Director Pelletier stated that he had some discussions but planned on continuing the conversation with the Commission at the August meeting.</p> |                                       |

| <b>Agenda Item</b>     | <b>Discussion</b>  | <b>Outcome/Action Item/Responsible Party</b>   |
|------------------------|--|--|
| Public Comment         | <p>Mr. Ruffner, a MCCLS rostered attorney, provided some commentary on the Pretrial Task Force, the Holistic Defense Project, and thoughts on the Governor's Bill (LD 1433). The Pretrial Task Force is looking to positively impact clients and MCCLS caseloads, particularly in response to bail violations and license suspension issues that are triggered by non-driving events. Mr. Ruffner also stated that the Holistic Defense Project is now a charitable entity under 501(c)(3) status with a board including: Ron Schneider, Stacey Neumann, Lisa Nash, Professor Dunne, and Valerie Randall, another MCCLS rostered attorney. The Holistic Defense Project goal is to represent the "whole client" and recognizing the complications that come with indigent defense representation besides criminal matters, especially in Cumberland County. As to LD 1433, Mr. Ruffner indicated that while there are some good provisions that focus on weighted case load standards, there are many objectionable provisions including application fees, the needless replacement of "quality" with "adequate," and the deliberate choice to not expand existing staff nor continue to encourage supervision of assigned counsel. Mr. Ruffner also stated that he is working with the University of Maine School of Law to hold a one-day symposium in late September/October with Professor Jamesa Drake, David Carroll of the Sixth Amendment Center, and NLADA to talk about this bill and have a substantive discussion. His goal is to invite bill sponsors and other legislators who have an interest in this bill, as well as the Commission (MCCLS) and MACDL.</p> | <p>Robert Ruffner, Esq.<br/>MCCLS Rostered Attorney</p>  |
| Executive Session      | None   |  |
| Adjournment of meeting | <p>The Commission voted to adjourn with the next meeting to be on August 11, 2015 at 9:30 am with the Public Comment session to be held at 10:30 am following the Commission Meeting. Meeting and Public Hearing will be held in the Judiciary Committee Room of the Statehouse in Augusta, Maine.</p>   | <p>Commissioner Logan moved to adjourn.<br/>Commissioner Glazier seconded. All present voted in favor.</p> |

(2.)  
**Operations Reports  
Review**

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MAINE COMMISSION ON INDIGENT LEGAL SERVICES

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**TO:** MCILS COMMISSIONERS  
**FROM:** JOHN D. PELLETHIER, EXECUTIVE DIRECTOR  
**SUBJECT:** JULY 2015 OPERATIONS REPORTS  
**DATE:** AUGUST 4, 2015

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Attached you will find the July, 2015 Operations Reports for your review and our discussion at the upcoming Commission meeting on August 11, 2015. A summary of the operations reports follows:

- 2,085 new cases were opened in the DefenderData system in July. This was a 103 case decrease from June.
- The number of vouchers submitted electronically in July was 2,462, a decrease of 247 vouchers from June, totaling \$1,226,795.29, a decrease of \$223,000 from June. In July, we paid 1,857 electronic vouchers totaling \$942,844.10, representing a decrease of 1300 vouchers and \$738,000 from June.
- There was one paper vouchers submitted and paid in July totaling \$213.50.
- The average price per voucher in July was \$507.57, down \$22.70 per voucher from June. As compared to the FY'15 year-end average was \$475.78, the average price per voucher was up 6.7%, reflecting the impact of the 9.1% increase in the hourly wage for work done on or after July 1, 2015
- Appeal and Post-Conviction Review cases had the highest average vouchers in July. There were 5 vouchers exceeding \$5,000 paid in July. Two cases involved Gross Sexual Assault charges. One of these cases required pretrial litigation regarding the integrity of the investigating department, the withholding of exculpatory information, and prosecution review of confidential defense material. That case has been transferred to a new court with new prosecutors and is pending resolution. The other GSA case also involved pretrial litigation and resulted in a plea to a misdemeanor without any sex offender registration requirement. Two other cases involved 3-day trials on charges of Sexual abuse of a Minor, one resulting in a not guilty verdict. The final case involved an appeal by new counsel from a 10-day murder trial.

In our All Other Account, the total expenses for the month of July were \$1,034,674.33. Of the amount, just over \$11,000 was devoted to the Commission's operating expenses.

In the Personal Services Account, we had \$73,500.45 in expenses for the month of July.

In the Revenue Account, our monthly transfer from the Judicial Branch for counsel fees for the month of July, which reflects June's collections, totaled \$54,101.64, down approximately \$15,000 from the previous month.

In our Conference Account, we paid on charge related to the April 1<sup>st</sup> criminal training, leaving a cash balance of 12,481.84.

MAINE COMMISSION ON INDIGENT LEGAL SERVICES

Activity Report by Case Type

7/31/2015

| DefenderData Case Type                   | Jul-15       |                    |                       |               |                     |                 | Fiscal Year 2016 |               |                     |                 |  |  |
|--|--------------|--------------------|-----------------------|---------------|---------------------|-----------------|------------------|---------------|---------------------|-----------------|--|--|
|  | New Cases    | Vouchers Submitted | Submitted Amount      | Vouchers Paid | Approved Amount     | Average Amount  | Cases Opened     | Vouchers Paid | Amount Paid         | Average Amount  |  |  |
| Appeal                                   | 12           | 23                 | \$29,332.93           | 21            | \$32,418.22         | \$1,543.72      | 12               | 21            | \$32,418.22         | \$1,543.72      |  |  |
| Child Protection Petition                | 149          | 366                | \$211,485.52          | 263           | \$156,908.93        | \$596.61        | 149              | 263           | \$156,908.93        | \$596.61        |  |  |
| Drug Court                               | 1            | 3                  | \$2,598.00            | 8             | \$2,076.00          | \$259.50        | 1                | 8             | \$2,076.00          | \$259.50        |  |  |
| Emancipation                             | 6            | 16                 | \$4,634.43            | 14            | \$3,337.11          | \$238.37        | 6                | 14            | \$3,337.11          | \$238.37        |  |  |
| Felony                                   | 520          | 523                | \$430,872.55          | 415           | \$348,482.44        | \$839.72        | 520              | 415           | \$348,482.44        | \$839.72        |  |  |
| Involuntary Civil Commitment             | 64           | 79                 | \$18,664.30           | 56            | \$13,995.51         | \$249.92        | 64               | 56            | \$13,995.51         | \$249.92        |  |  |
| Juvenile                                 | 85           | 93                 | \$39,280.11           | 56            | \$26,239.32         | \$468.56        | 85               | 56            | \$26,239.32         | \$468.56        |  |  |
| Lawyer of the Day - Custody              | 228          | 203                | \$47,359.04           | 144           | \$33,894.89         | \$235.38        | 228              | 144           | \$33,894.89         | \$235.38        |  |  |
| Lawyer of the Day - Juvenile             | 43           | 42                 | \$8,491.92            | 33            | \$6,859.10          | \$207.85        | 43               | 33            | \$6,859.10          | \$207.85        |  |  |
| Lawyer of the Day - Walk-in              | 128          | 104                | \$23,592.86           | 70            | \$15,334.26         | \$219.06        | 128              | 70            | \$15,334.26         | \$219.06        |  |  |
| Misdemeanor                              | 633          | 614                | \$231,273.41          | 488           | \$175,763.95        | \$360.17        | 633              | 488           | \$175,763.95        | \$360.17        |  |  |
| Petition, Modified Release Treatment     | 1            | 3                  | \$906.80              | 7             | \$3,644.40          | \$520.63        | 1                | 7             | \$3,644.40          | \$520.63        |  |  |
| Petition, Release or Discharge           | 0            | 1                  | \$158.75              | 0             |                     |                 | 0                | 0             |                     |                 |  |  |
| Petition, Termination of Parental Rights | 10           | 40                 | \$25,160.47           | 26            | \$16,237.74         | \$624.53        | 10               | 26            | \$16,237.74         | \$624.53        |  |  |
| Post Conviction Review                   | 11           | 4                  | \$5,559.25            | 2             | \$2,741.45          | \$1,370.73      | 11               | 2             | \$2,741.45          | \$1,370.73      |  |  |
| Probation Violation                      | 169          | 194                | \$69,151.76           | 137           | \$48,531.87         | \$354.25        | 169              | 137           | \$48,531.87         | \$354.25        |  |  |
| Represent Witness on 5th Amendment       | 0            | 0                  |                       | 2             | \$528.66            | \$264.33        | 0                | 2             | \$528.66            | \$264.33        |  |  |
| Review of Child Protection Order         | 21           | 153                | \$78,206.69           | 114           | \$55,783.75         | \$489.33        | 21               | 114           | \$55,783.75         | \$489.33        |  |  |
| Revocation of Administrative Release     | 4            | 1                  | \$66.50               | 1             | \$66.50             | \$66.50         | 4                | 1             | \$66.50             | \$66.50         |  |  |
| <b>DefenderData Sub-Total</b>            | <b>2,085</b> | <b>2,462</b>       | <b>\$1,226,795.29</b> | <b>1,857</b>  | <b>\$942,844.10</b> | <b>\$507.72</b> | <b>2,085</b>     | <b>1,857</b>  | <b>\$942,844.10</b> | <b>\$507.72</b> |  |  |
| <b>Paper Voucher Sub-Total</b>           | <b>1</b>     | <b>1</b>           | <b>\$213.50</b>       | <b>1</b>      | <b>\$213.50</b>     | <b>\$213.50</b> | <b>1</b>         | <b>1</b>      | <b>\$213.50</b>     | <b>\$213.50</b> |  |  |
| <b>TOTAL</b>                             | <b>2,086</b> | <b>2,463</b>       | <b>\$1,227,008.79</b> | <b>1,858</b>  | <b>\$943,057.60</b> | <b>\$507.57</b> | <b>2,086</b>     | <b>1,858</b>  | <b>\$943,057.60</b> | <b>\$507.57</b> |  |  |

MAINE COMMISSION ON INDIGENT LEGAL SERVICES  
 FY16 FUND ACCOUNTING  
 AS OF 07/31/2015

| Account 010 95F 2112 01<br>(All Other) | Mo. | Q1                     | Mo. | Q2          | Mo. | Q3          | Mo. | Q4          | FY15 Total             |
|--|-----|------------------------|-----|-------------|-----|-------------|-----|-------------|------------------------|
| FY15 Professional Services Allotment   | **  | \$ 4,579,962.00        |     |             |     |             |     |             |                        |
| FY15 General Operations Allotment      |     | \$ -                   |     |             |     |             |     |             |                        |
| Financial Order Adjustment             |     | \$ -                   |     |             |     |             |     |             |                        |
| Financial Order Adjustment             |     | \$ -                   |     |             |     |             |     |             |                        |
| Financial Order Adjustment             |     | \$ -                   |     |             |     |             |     |             |                        |
| Financial Order Adjustment             |     | \$ -                   |     |             |     |             |     |             |                        |
| Financial Order Adjustment             |     | \$ -                   |     |             |     |             |     |             |                        |
| Financial Order Adjustment             |     | \$ -                   |     |             |     |             |     |             |                        |
| <b>Total Budget Allotments</b>         |     | <b>\$ 4,579,962.00</b> |     | <b>\$ -</b> |     | <b>\$ -</b> |     | <b>\$ -</b> | <b>\$ 4,579,962.00</b> |
| Total Expenses                         | 1   | \$ (1,034,674.33)      | 4   | \$ -        | 7   | \$ -        | 10  | \$ -        | \$ (1,034,674.33)      |
|  | 2   | \$ -                   | 5   | \$ -        | 8   | \$ -        | 11  | \$ -        | \$ -                   |
|  | 3   | \$ -                   | 6   | \$ -        | 9   | \$ -        | 12  | \$ -        | \$ -                   |
| Encumbrances                           |     | \$ (260,562.50)        |     | \$ -        |     | \$ -        |     | \$ -        | \$ (260,562.50)        |
| <b>TOTAL REMAINING</b>                 |     | <b>\$ 3,284,725.17</b> |     | <b>\$ -</b> |     | <b>\$ -</b> |     | <b>\$ -</b> | <b>\$ 3,284,725.17</b> |

| Q1 Month 1 (as of 07/31/15)    |                          |
|--------------------------------|--------------------------|
| <b>INDIGENT LEGAL SERVICES</b> |                          |
| Counsel Payments               | \$ (943,057.60)          |
| Somerset County                | \$ (23,078.50)           |
| Subpoena Witness Fees          | \$ (13.08)               |
| Private Investigators          | \$ (22,022.88)           |
| Mental Health Expert           | \$ (12,714.38)           |
| Transcripts                    | \$ (10,871.10)           |
| Other Expert                   | \$ (10,112.00)           |
| Air fare-out of state witness  |                          |
| Process Servers                | \$ (994.93)              |
| Interpreters                   | \$ (219.10)              |
| Misc Prof Fees & Serv          | \$ (205.00)              |
| <b>SUB-TOTAL IIS</b>           | <b>\$ (1,023,288.57)</b> |

| INDIGENT LEGAL SERVICES   |                   |
|---|-------------------|
| Q1 Allotment  | \$ 4,579,962.00   |
| Q1 Encumbrances for Somerset city POP & Justice Works contracts | \$ (260,562.50)   |
| Q1 Expenses as of 07/31/15                                      | \$ (1,034,674.33) |
| Remaining Q1 Allotment as of 07/31/15                           | \$ 3,284,725.17   |

\*\* REFLECTS TEMPORARY WORK PROGRAM

| OPERATING EXPENSES             |                          |
|--------------------------------|--------------------------|
| Service Center                 | \$ -                     |
| DefenderData                   | \$ (4,811.50)            |
| Risk Management                | \$ (1,044.29)            |
| Mileage/Tolls/Parking          | \$ (1,708.88)            |
| Mailing/Postage/Freight        | \$ (491.51)              |
| Registration Fees-John & Ellie | \$ (444.00)              |
| Parking Fees-Auburn            | \$ (405.00)              |
| Office Supplies/Equip.         | \$ -                     |
| Cellular Phones                | \$ -                     |
| Subscriptions                  | \$ (98.00)               |
| Office Equipment Rental        | \$ -                     |
| OIT/TELCO                      | \$ (2,382.58)            |
| <b>SUB-TOTAL OE</b>            | <b>\$ (11,385.76)</b>    |
| <b>TOTAL</b>                   | <b>\$ (1,034,674.33)</b> |

MAINE COMMISSION ON INDIGENT LEGAL SERVICES  
 FY16 FUND ACCOUNTING  
 As of 07/31/15

| Account 014 99F 2112 01<br>(Revenue) |  | Mo. | Q1            | Mo. | Q2         | Mo. | Q3   | Mo. | Q4   | FY16 Total    |
|--------------------------------------|--|-----|---------------|-----|------------|-----|------|-----|------|---------------|
| <b>Total Budget Allotments</b>       |  | **  | \$ 160,125.00 |     | \$ -       |     | \$ - |     | \$ - | \$ 160,125.00 |
| Financial Order Adjustment           |  | 1   | \$ -          | 4   | \$ -       | 7   | \$ - | 10  | \$ - |               |
| Financial Order Adjustment           |  | 2   | \$ -          | 5   | \$ -       | 8   | \$ - | 11  | \$ - |               |
| Budget Order Adjustment              |  | 3   | \$ -          | 6   | \$ -       | 9   | \$ - | 12  | \$ - |               |
| Financial Order Adjustment           |  |     | \$ -          | 4   | \$ -       | 5   | \$ - |     | \$ - |               |
| <b>Total Budget Allotments</b>       |  |     | \$ 160,125.00 |     | \$ -       |     | \$ - |     | \$ - | \$ 160,125.00 |
| Collected Revenue from J8            |  | 1   | \$ -          | 4   | \$ -       | 7   | \$ - | 10  | \$ - |               |
| Promissory Note Payments             |  |     | \$ 54,101.64  |     |            |     |      |     | \$ - |               |
| Collected Revenue from J8            |  | 2   | \$ -          | 5   | \$ -       | 8   | \$ - | 11  | \$ - |               |
| Promissory Note Payments             |  |     | \$ 50.00      |     |            |     |      |     | \$ - |               |
| Discovery sanction payment           |  |     | \$ -          |     |            |     |      |     | \$ - |               |
| Collected Revenue from J8            |  | 3   | \$ -          | 6   | \$ -       | 9   | \$ - | 12  | \$ - |               |
| Promissory Note Payments             |  |     | \$ -          |     |            |     |      |     | \$ - |               |
| <b>TOTAL REVENUE COLLECTED</b>       |  |     | \$ 54,151.64  |     | \$ -       |     | \$ - |     | \$ - | \$ 54,151.64  |
| Counsel Payments                     |  | 1   | \$ -          | 4   | \$ -       | 7   | \$ - | 10  | \$ - |               |
|                                      |  | 2   | \$ -          | 5   | \$ -       | 8   | \$ - | 11  | \$ - |               |
|                                      |  | 3   | \$ -          | 6   | \$ -       | 9   | \$ - | 12  | \$ - |               |
| <b>REMAINING ALLOTMENT</b>           |  |     | \$ 160,125.00 |     | \$ -       |     | \$ - |     | \$ - | \$ 160,125.00 |
| Total Expenses                       |  | 1   | \$ -          | 4   | \$ (90.50) | 7   | \$ - | 10  | \$ - |               |
|                                      |  | 2   | \$ -          | 5   | \$ -       | 8   | \$ - | 11  | \$ - |               |
|                                      |  | 3   | \$ -          | 6   | \$ -       | 9   | \$ - | 12  | \$ - |               |
| <b>REMAINING CASH</b>                |  |     | \$ 54,061.14  |     | \$ -       |     | \$ - |     | \$ - | \$ 54,061.14  |

| Q1: Month 1 (as of 07/31/15)    |               |
|---------------------------------|---------------|
| DEFENDER DATA COUNSEL PAYMENTS  | \$ -          |
| <b>SUB-TOTAL US</b>             | \$ -          |
| OVERPAYMENT REIMBURSEMENTS      | \$ (2,394.19) |
| Paper Voucher                   | \$ -          |
| Somerset County CDs             | \$ -          |
| Private Investigators           | \$ -          |
| Mental Health Expert            | \$ -          |
| Transcripts                     | \$ -          |
| Other Expert                    | \$ (90.50)    |
| Financial Screener Meeting meal | \$ (2,484.69) |
| <b>SUB-TOTAL OE</b>             | \$ (2,484.69) |
| <b>TOTAL</b>                    | \$ (2,484.69) |

| INDIGENT LEGAL SERVICES        |               |
|--------------------------------|---------------|
| FY16 Q1 Allotment              | \$ 160,125.00 |
| FY15 Carry Forward             | \$ 59,106.00  |
| YTD Collected Revenue          | \$ 54,151.64  |
| YTD Expenses                   | \$ (90.50)    |
| YTD Overpayment Reimbursements | \$ (2,394.19) |
| YTD Counsel Payments           | \$ -          |
| Q1 Remaining Unexpended Cash   | \$ 110,772.95 |

\*\* REFLECTS TEMPORARY WORK PROGRAM

MAINE COMMISSION ON INDIGENT LEGAL SERVICES  
 FY16 FUND ACCOUNTING  
 AS OF 07/31/2015

| Account 010 95F Z11Z 01<br>(Personal Services) |    | Mo.       | Q1                | Mo.       | Q2       | Mo.       | Q3       | Mo.       | Q4       | FY15 Total        |
|--|----|-----------|-------------------|-----------|----------|-----------|----------|-----------|----------|-------------------|
| FY15 Allotment                                 | ** | \$        | 190,070.00        | \$        | -        | \$        | -        | \$        | -        | \$                |
| Financial Order Adjustments                    |    | \$        | -                 | \$        | -        | \$        | -        | \$        | -        | \$                |
| Financial Order Adjustments                    |    | \$        | -                 | \$        | -        | \$        | -        | \$        | -        | \$                |
| Budget Order Adjustments                       |    | \$        | -                 | \$        | -        | \$        | -        | \$        | -        | \$                |
| <b>Total Budget Allotments</b>                 |    | <b>\$</b> | <b>190,070.00</b> | <b>\$</b> | <b>-</b> | <b>\$</b> | <b>-</b> | <b>\$</b> | <b>-</b> | <b>\$</b>         |
| Total Expenses                                 |    | \$        | (73,500.45)       | \$        | -        | \$        | -        | \$        | -        | \$                |
|  | 1  | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
|  | 2  | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
|  | 3  | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
|  | 4  | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
|  | 5  | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
|  | 6  | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
|  | 7  | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
|  | 8  | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
|  | 9  | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
|  | 10 | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
|  | 11 | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
|  | 12 | \$        |                   | \$        |          | \$        |          | \$        |          | \$                |
| <b>TOTAL REMAINING</b>                         |    | <b>\$</b> | <b>116,569.55</b> | <b>\$</b> | <b>-</b> | <b>\$</b> | <b>-</b> | <b>\$</b> | <b>-</b> | <b>\$</b>         |
|  |    |           |                   |           |          |           |          |           |          | <b>116,569.55</b> |

**Q1 Month 1 (as of 07/31/14)**

|                                |           |                    |
|--------------------------------|-----------|--------------------|
| Per Diem Payments              | \$        | (495.00)           |
| Salary                         | \$        | (31,102.83)        |
| Vacation Pay                   | \$        | (7,866.84)         |
| Holiday Pay                    | \$        | (1,540.80)         |
| Sick Pay                       | \$        | (1,704.94)         |
| Employee Hlth Sys/Workers Comp | \$        | (74.00)            |
| Health Insurance               | \$        | (9,877.93)         |
| Dental Insurance               | \$        | (262.62)           |
| Employer Retiree Health        | \$        | (4,607.15)         |
| Employer Retirement            | \$        | (3,238.22)         |
| Employer Group Life            | \$        | (333.06)           |
| Employer Medicare              | \$        | (627.41)           |
| Retiree Unfunded Liability     | \$        | (7,867.65)         |
| Retro Pymt                     | \$        | (20.80)            |
| Perm Part Time Full Ben        | \$        | (3,881.20)         |
| <b>TOTAL</b>                   | <b>\$</b> | <b>(73,500.45)</b> |

\*\* REFLECTS TEMPORARY WORK PROGRAM

MAINE COMMISSION ON INDIGENT LEGAL SERVICES  
 FY16 FUND ACCOUNTING  
 As of 07/31/15

| Account 01495FZII2.02<br>(Conference) |  | Mo. | Q1           | Mo. | Q2   | Mo. | Q3   | Mo. | Q4   | FY14 Total   |
|---------------------------------------|--|-----|--------------|-----|------|-----|------|-----|------|--------------|
| <b>Total Budget Allotments</b>        |  | **  | \$ 17,635.00 |     | \$ - |     | \$ - |     | \$ - | \$ 17,635.00 |
| Financial Order Adjustment            |  | 1   | \$ -         | 4   | \$ - | 7   | \$ - | 10  | \$ - |              |
| Financial Order Adjustment            |  | 2   | \$ -         | 5   | \$ - | 8   | \$ - | 11  | \$ - |              |
| Budget Order Adjustment               |  | 3   | \$ -         | 6   | \$ - | 9   | \$ - | 12  | \$ - |              |
| <b>Total Budget Allotments</b>        |  |     | \$ 17,635.00 |     | \$ - |     | \$ - |     | \$ - | \$ 17,635.00 |
| Collected Revenue                     |  | 1   | \$ -         | 4   | \$ - | 7   | \$ - | 10  | \$ - |              |
| Collected Revenue                     |  | 2   | \$ -         | 5   | \$ - | 8   | \$ - | 11  | \$ - |              |
| Collected Revenue                     |  | 3   | \$ -         | 6   | \$ - | 9   | \$ - | 12  | \$ - |              |
| <b>TOTAL REVENUE COLLECTED</b>        |  |     | \$ -         |     | \$ - |     | \$ - |     | \$ - | \$ -         |
| Total Expenses                        |  | 1   | \$ (99.00)   | 4   | \$ - | 7   | \$ - | 10  | \$ - |              |
|                                       |  | 2   | \$ -         | 5   | \$ - | 8   | \$ - | 11  | \$ - |              |
|                                       |  | 3   | \$ -         | 6   | \$ - | 9   | \$ - | 12  | \$ - |              |
| <b>REMAINING ALLOTMENT</b>            |  |     | \$ 17,536.00 |     | \$ - |     | \$ - |     | \$ - | \$ 17,536.00 |
| <b>REMAINING CASH (CARRY OVER)</b>    |  |     | \$ 12,481.84 |     | \$ - |     | \$ - |     | \$ - | \$ 12,481.84 |

| Q1 Month 1 (as of 07/31/15)  |  | Mo. | Q1         |
|------------------------------|--|-----|------------|
| Training Manuals Printing    |  |     | \$ -       |
| Training Refreshments/Meals  |  |     | \$ -       |
| Speaker Hotel Room & Lodging |  |     | \$ (99.00) |
| Refund(s) for non-attendance |  |     | \$ -       |
| Office Supplies              |  |     | \$ -       |
| CLE App to the Bar           |  |     | \$ -       |
| <b>SUB-TOTAL OE</b>          |  |     | \$ (99.00) |
| <b>TOTAL</b>                 |  |     | \$ (99.00) |

| INDIGENT LEGAL SERVICES      |  | FY16 Q1 Allotment |
|------------------------------|--|-------------------|
| FY16 Q1 Allotment            |  | \$ 17,635.00      |
| FY15 Carry Forward           |  | \$ 12,580.84      |
| YTD Collected Revenue        |  | \$ -              |
| YTD Expenses                 |  | \$ (99.00)        |
| Q1 Remaining Unexpended Cash |  | \$ 12,481.84      |

\*\* REFLECTS TEMPORARY WORK PROGRAM

MAINE COMMISSION ON INDIGENT LEGAL SERVICES

Activity Report by Court  
7/31/2015

| Court        | Jul-15       |                    |                       |               |                      |                 | Fiscal Year 2016 |               |                     |                 |
|--------------|--------------|--------------------|-----------------------|---------------|----------------------|-----------------|------------------|---------------|---------------------|-----------------|
|              | New Cases    | Vouchers Submitted | Submitted Amount      | Vouchers Paid | Approved Amount      | Average Amount  | Cases Opened     | Vouchers Paid | Amount Paid         | Average Amount  |
| ALFSC        | 78           | 184                | \$131,643.82          | 147           | \$ 123,575.49        | \$840.65        | 78               | 147           | \$ 123,575.49       | \$840.65        |
| AUBSC        | 58           | 82                 | \$45,388.71           | 60            | \$ 37,364.32         | \$622.74        | 58               | 60            | \$ 37,364.32        | \$622.74        |
| AUGDC        | 58           | 69                 | \$28,238.33           | 61            | \$ 25,097.93         | \$411.44        | 58               | 61            | \$ 25,097.93        | \$411.44        |
| AUGSC        | 44           | 85                 | \$67,200.57           | 78            | \$ 43,463.74         | \$557.23        | 44               | 78            | \$ 43,463.74        | \$557.23        |
| BANDC        | 48           | 76                 | \$27,797.68           | 64            | \$ 19,452.24         | \$303.94        | 48               | 64            | \$ 19,452.24        | \$303.94        |
| BANSC        | 4            | 6                  | \$1,868.90            | 4             | \$ 805.25            | \$201.31        | 4                | 4             | \$ 805.25           | \$201.31        |
| BATSC        | 0            | 2                  | \$418.25              | 1             | \$ 89.75             | \$89.75         | 0                | 1             | \$ 89.75            | \$89.75         |
| BELDC        | 5            | 28                 | \$8,044.32            | 29            | \$ 7,104.25          | \$244.97        | 5                | 29            | \$ 7,104.25         | \$244.97        |
| BELSC        | 4            | 15                 | \$6,905.24            | 16            | \$ 11,242.75         | \$702.67        | 4                | 16            | \$ 11,242.75        | \$702.67        |
| BIDDC        | 93           | 103                | \$55,132.41           | 81            | \$ 41,223.49         | \$508.93        | 93               | 81            | \$ 41,223.49        | \$508.93        |
| BRIDC        | 13           | 25                 | \$13,063.65           | 14            | \$ 8,922.23          | \$637.30        | 13               | 14            | \$ 8,922.23         | \$637.30        |
| CALDC        | 8            | 24                 | \$16,137.93           | 7             | \$ 1,453.35          | \$207.62        | 8                | 7             | \$ 1,453.35         | \$207.62        |
| CARDC        | 17           | 27                 | \$13,465.21           | 28            | \$ 15,129.02         | \$540.32        | 17               | 28            | \$ 15,129.02        | \$540.32        |
| CARSC        | 36           | 45                 | \$23,591.76           | 26            | \$ 14,568.92         | \$560.34        | 36               | 26            | \$ 14,568.92        | \$560.34        |
| DOVDC        | 2            | 12                 | \$3,764.64            | 9             | \$ 2,719.42          | \$302.16        | 2                | 9             | \$ 2,719.42         | \$302.16        |
| DOVSC        | 1            | 0                  |                       | 0             |                      |                 | 1                | 0             |                     |                 |
| ELLDC        | 17           | 70                 | \$31,823.25           | 42            | \$ 21,108.00         | \$502.57        | 17               | 42            | \$ 21,108.00        | \$502.57        |
| ELLSC        | 2            | 5                  | \$2,024.18            | 9             | \$ 2,326.18          | \$258.46        | 2                | 9             | \$ 2,326.18         | \$258.46        |
| FARDC        | 9            | 11                 | \$4,948.80            | 12            | \$ 9,490.15          | \$790.85        | 9                | 12            | \$ 9,490.15         | \$790.85        |
| FARSC        | 1            | 0                  |                       | 2             | \$ 180.40            | \$90.20         | 1                | 2             | \$ 180.40           | \$90.20         |
| FORDC        | 10           | 11                 | \$5,518.28            | 10            | \$ 5,057.78          | \$505.78        | 10               | 10            | \$ 5,057.78         | \$505.78        |
| HOUDC        | 41           | 58                 | \$21,012.09           | 28            | \$ 10,081.43         | \$360.05        | 41               | 28            | \$ 10,081.43        | \$360.05        |
| HOUSC        | 16           | 14                 | \$7,278.85            | 15            | \$ 8,797.45          | \$586.50        | 16               | 15            | \$ 8,797.45         | \$586.50        |
| LEWDC        | 116          | 167                | \$71,431.80           | 108           | \$ 44,031.85         | \$407.70        | 116              | 108           | \$ 44,031.85        | \$407.70        |
| LINDC        | 10           | 9                  | \$3,963.46            | 7             | \$ 2,248.48          | \$321.21        | 10               | 7             | \$ 2,248.48         | \$321.21        |
| MACDC        | 22           | 26                 | \$7,342.34            | 28            | \$ 9,555.04          | \$341.25        | 22               | 28            | \$ 9,555.04         | \$341.25        |
| MACSC        | 9            | 5                  | \$2,322.60            | 6             | \$ 1,853.60          | \$308.93        | 9                | 6             | \$ 1,853.60         | \$308.93        |
| MADDC        | 7            | 5                  | \$1,328.86            | 3             | \$ 1,042.86          | \$347.62        | 7                | 3             | \$ 1,042.86         | \$347.62        |
| MILDC        | 3            | 1                  | \$240.00              | 0             |                      |                 | 3                | 0             |                     |                 |
| NEWDC        | 24           | 35                 | \$12,622.82           | 27            | \$ 9,546.74          | \$353.58        | 24               | 27            | \$ 9,546.74         | \$353.58        |
| PORDC        | 76           | 107                | \$52,132.54           | 78            | \$ 44,174.11         | \$566.33        | 76               | 78            | \$ 44,174.11        | \$566.33        |
| PORSC        | 6            | 2                  | \$3,048.25            | 0             |                      |                 | 6                | 0             |                     |                 |
| PREDC        | 12           | 52                 | \$20,726.51           | 57            | \$ 18,842.84         | \$330.58        | 12               | 57            | \$ 18,842.84        | \$330.58        |
| RODC         | 17           | 31                 | \$8,702.31            | 25            | \$ 6,517.49          | \$260.70        | 17               | 25            | \$ 6,517.49         | \$260.70        |
| ROCSC        | 10           | 23                 | \$14,126.51           | 13            | \$ 7,309.50          | \$562.27        | 10               | 13            | \$ 7,309.50         | \$562.27        |
| RUMDC        | 18           | 20                 | \$6,749.96            | 13            | \$ 5,277.18          | \$405.94        | 18               | 13            | \$ 5,277.18         | \$405.94        |
| SKODC        | 13           | 42                 | \$17,894.04           | 32            | \$ 12,465.42         | \$389.54        | 13               | 32            | \$ 12,465.42        | \$389.54        |
| SKOSC        | 1            | 1                  | \$364.00              | 1             | \$ 364.00            | \$364.00        | 1                | 1             | \$ 364.00           | \$364.00        |
| SOUDC        | 23           | 44                 | \$10,597.55           | 17            | \$ 5,485.25          | \$322.66        | 23               | 17            | \$ 5,485.25         | \$322.66        |
| SOUSC        | 26           | 36                 | \$15,344.33           | 21            | \$ 7,289.41          | \$347.11        | 26               | 21            | \$ 7,289.41         | \$347.11        |
| SPRDC        | 61           | 55                 | \$28,814.47           | 41            | \$ 23,430.80         | \$571.48        | 61               | 41            | \$ 23,430.80        | \$571.48        |
| Law Ct       | 10           | 16                 | \$21,484.50           | 14            | \$ 24,090.57         | \$1,720.76      | 10               | 14            | \$ 24,090.57        | \$1,720.76      |
| YORCO        | 27           | 1                  | \$629.66              | 1             | \$ 629.66            | \$629.66        | 27               | 1             | \$ 629.66           | \$629.66        |
| AROCD        | 4            | 0                  |                       | 0             |                      |                 | 4                | 0             |                     |                 |
| ANDCD        | 65           | 1                  | \$252.00              | 1             | \$ 252.00            | \$252.00        | 65               | 1             | \$ 252.00           | \$252.00        |
| KENCD        | 120          | 58                 | \$15,605.49           | 46            | \$ 11,988.17         | \$260.61        | 120              | 46            | \$ 11,988.17        | \$260.61        |
| PENCD        | 181          | 207                | \$96,522.45           | 134           | \$ 65,541.57         | \$489.12        | 181              | 134           | \$ 65,541.57        | \$489.12        |
| SAGCD        | 24           | 22                 | \$13,456.62           | 16            | \$ 9,573.00          | \$598.31        | 24               | 16            | \$ 9,573.00         | \$598.31        |
| WALCD        | 22           | 11                 | \$2,534.30            | 15            | \$ 4,254.00          | \$283.60        | 22               | 15            | \$ 4,254.00         | \$283.60        |
| PISCD        | 10           | 19                 | \$12,311.30           | 13            | \$ 5,342.04          | \$410.93        | 10               | 13            | \$ 5,342.04         | \$410.93        |
| HANCD        | 68           | 52                 | \$23,562.34           | 30            | \$ 11,912.89         | \$397.10        | 68               | 30            | \$ 11,912.89        | \$397.10        |
| FRACD        | 49           | 37                 | \$17,787.43           | 41            | \$ 17,247.14         | \$420.66        | 49               | 41            | \$ 17,247.14        | \$420.66        |
| WASCD        | 7            | 1                  | \$150.00              | 0             |                      |                 | 7                | 0             |                     |                 |
| CUMCD        | 286          | 247                | \$141,410.32          | 209           | \$ 123,464.28        | \$590.74        | 286              | 209           | \$ 123,464.28       | \$590.74        |
| KNOCD        | 58           | 26                 | \$6,834.37            | 14            | \$ 3,609.26          | \$257.80        | 58               | 14            | \$ 3,609.26         | \$257.80        |
| SOMCD        | 0            | 2                  | \$508.50              | 1             | \$ 251.50            | \$251.50        | 0                | 1             | \$ 251.50           | \$251.50        |
| OXFCD        | 25           | 2                  | \$510.00              | 1             | \$ 330.00            | \$330.00        | 25               | 1             | \$ 330.00           | \$330.00        |
| LINCD        | 22           | 10                 | \$4,034.92            | 12            | \$ 4,343.76          | \$361.98        | 22               | 12            | \$ 4,343.76         | \$361.98        |
| WATDC        | 30           | 36                 | \$16,257.23           | 20            | \$ 9,305.23          | \$465.26        | 30               | 20            | \$ 9,305.23         | \$465.26        |
| WESDC        | 21           | 43                 | \$18,918.85           | 31            | \$ 14,292.06         | \$461.03        | 21               | 31            | \$ 14,292.06        | \$461.03        |
| WISDC        | 13           | 23                 | \$10,320.17           | 10            | \$ 3,198.23          | \$319.82        | 13               | 10            | \$ 3,198.23         | \$319.82        |
| WISSC        | 7            | 25                 | \$25,661.62           | 18            | \$ 19,683.88         | \$1,093.55      | 7                | 18            | \$ 19,683.88        | \$1,093.55      |
| YORDC        | 17           | 10                 | \$5,024.00            | 10            | \$ 4,846.75          | \$484.68        | 17               | 10            | \$ 4,846.75         | \$484.68        |
| <b>TOTAL</b> | <b>2,085</b> | <b>2,462</b>       | <b>\$1,226,795.29</b> | <b>1,857</b>  | <b>\$ 942,844.10</b> | <b>\$507.72</b> | <b>2,085</b>     | <b>1,857</b>  | <b>\$942,844.10</b> | <b>\$507.72</b> |

**MAINE COMMISSION ON INDIGENT LEGAL SERVICES**

**Number of Attorneys Rostered by Court**

07/31/2015

| <b>Court</b>                  | <b>Rostered Attorneys</b> | <b>Court</b>                           | <b>Rostered Attorneys</b> |
|-------------------------------|---------------------------|--|---------------------------|
| Augusta District Court        | 101                       | South Paris District Court             | 69                        |
| Bangor District Court         | 59                        | Springvale District Court              | 127                       |
| Belfast District Court        | 51                        | Unified Criminal Docket Alfred         | 115                       |
| Biddeford District Court      | 142                       | Unified Criminal Docket Arrostook      | 24                        |
| Bridgton District Court       | 108                       | Unified Criminal Docket Auburn         | 118                       |
| Calais District Court         | 13                        | Unified Criminal Docket Augusta        | 95                        |
| Caribou District Court        | 19                        | Unified Criminal Docket Bangor         | 61                        |
| Dover-Foxcroft District Court | 28                        | Unified Criminal Docket Bath           | 95                        |
| Ellsworth District Court      | 44                        | Unified Criminal Docket Belfast        | 45                        |
| Farmington District Court     | 26                        | Unified Criminal Docket Dover-Foxcroft | 24                        |
| Fort Kent District Court      | 11                        | Unified Criminal Docket Ellsworth      | 38                        |
| Houlton District Court        | 18                        | Unified Criminal Docket Farmington     | 28                        |
| Lewiston District Court       | 143                       | Unified Criminal Docket Machias        | 17                        |
| Lincoln District Court        | 31                        | Unified Criminal Docket Portland       | 154                       |
| Machias District Court        | 19                        | Unified Criminal Docket Rockland       | 43                        |
| Madawaska District Court      | 12                        | Unified Criminal Docket Skowhegan      | 21                        |
| Millinocket District Court    | 21                        | Unified Criminal docket Soputh Paris   | 114                       |
| Newport District Court        | 39                        | Unified Criminal Docket Wiscasset      | 74                        |
| Portland District Court       | 164                       | Waterville District Court              | 58                        |
| Presque Isle District Court   | 15                        | West Bath District Court               | 114                       |
| Rockland District Court       | 51                        | Wiscasset District Court               | 83                        |
| Rumford District Court        | 27                        | York District Court                    | 115                       |
| Skowhegan District Court      | 31                        |  |                           |

**(3.)**

**Report on Attorney  
Performance Evaluations**

MAINE COMMISSION ON INDIGENT LEGAL SERVICES

# Accountability Through Attorney Performance Evaluations

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Executive Summary

Katherine M. MacRae

11 August 2015

## Overview

The State of Maine currently uses a system of private assigned counsel to provide high quality indigent legal services, with oversight and guidance from the Maine Commission on Indigent Legal Services. The Sixth Amendment of the United States Constitution provides for the right to counsel for criminal defendants, regardless of a defendant's ability to pay. In 2002, the American Bar Association established ten black letter principles, *Ten Principles of a Public Defense Delivery System*, that every jurisdiction should follow to ensure quality and efficient representation for indigent clients. However, nationwide research conducted by the NLADA and the Sixth Amendment Center identified three ABA Principles most often overlooked by indigent legal services systems, *Principle One* (maintaining an independent system of representation), *Principle Eight* (ensuring parity of resources between defense counsel and the prosecution), and *Principle Ten* (providing continuous attorney supervision to monitor quality and efficient representation). Due to limited staff and resources, Maine's system is not compliant with respect to providing continuous, systematic supervision and monitoring of attorneys' performance. See 37 M.R.S. § 1804 (2)(D) (2009) (stating the Maine Commission on Indigent Legal Services' responsibilities and standards) and ABA *Principle Ten*.

The purpose of this Report is to recommend a method for evaluating attorney performance to bring Maine into compliance with the statutory requirements and the ABA's *Principles*. Establishing statewide consistent supervision of attorneys' performance ensures high quality, independent indigent legal services and provides parity of resources between the indigent criminal defense bar and the prosecution.

## Summary of Research

In addition to input provided by the NLADA and the Sixth Amendment Center, I conducted nationwide research on systems for evaluating attorney performance that I reduced to thirteen state models. I organized the systems based on the state's respective attorney performance evaluation methods ranging from surveys, enacted Standards of Performance, data collection, and hybrid models. I analyzed these performance evaluation systems according to the depth and quality of the method used, resulting in three distilled assessments: comprehensive performance evaluation models (Colorado, Massachusetts, North Carolina, Oregon, and Travis County (TX)), adequate performance evaluation models (San Mateo (CA) and Virginia), and minimum performance evaluation models (D.C., Vermont, New Hampshire, and New Mexico).

## Recommendations

Based on my research, the best model for the State of Maine is a hybrid system of attorney performance evaluations (Colorado, Massachusetts, North Carolina, Oregon, San Mateo (CA), Travis County (TX), Vermont, and Virginia) comprised of annual surveys sent to organizations and criminal justice actors that frequently interact with assigned counsel; robust Standards of Practice for juvenile, criminal, child protective, civil commitment, and appeals; a formal mentoring protocol that pairs a newly rostered attorney with an experienced attorney located in the same county; a brief and motion bank to provide the most frequently used legal documents to all rostered attorneys; a review and submission process for client complaints that would consist of forms, made available online and provided in all courthouses, as well as a monitored collect-call phone number; a contracted Supervising Attorney position located in each county that would ensure highly qualified and well-respected local attorneys provide in-person

monitoring of appointed counsel, such as court observations and conducting initial investigations of client complaints; and finally, a data collection system used to track case types, pretrial services and other criminal justice data by coordinating with the courts to receive monthly data retrieval. While this proposed hybrid system requires personnel and financial resources to implement, this recommended system provides a robust and comprehensive process for ensuring high quality representation and accountability to taxpayers and the local community.

The second recommended model that would provide a practical, low-cost method of attorney performance evaluation is a combined survey and standards of practice model based on Vermont's survey system and Virginia's robust Standards of Practice. This model would not require a significant increase in personnel or financial resources to implement. However, I would caution that this system is likely to result in minimal assurance of attorney compliance as compared to conducting in-depth reviews of attorneys' performance.

# Accountability Through Attorney Performance Evaluations

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Developing a System of Performance Evaluations  
for Private Assigned Counsel to Ensure Delivery of  
High-Quality Indigent Legal Services

**Katherine M. MacRae**

**11 August 2015**

On behalf of the Maine Commission on Indigent Legal Services and pursuant to the ABA's "Ten Principles of a Public Defense Delivery System," I conducted a national survey resulting in the following report of thirteen states' systems for providing indigent legal services and attorney performance evaluations, with additional input from the NLADA and the Sixth Amendment Center. The following report and recommendations are designed to provide the State of Maine with a resource for developing a system for evaluating private assigned counsels' performance to ensure high-quality, independent delivery of indigent legal services.

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## I. Research Summary

### A. Introduction

The State of Maine currently provides indigent legal services primarily through the use of private assigned counsel, with oversight from the Maine Commission on Indigent Legal Services (MCILS), headed by Executive Director John Pelletier. In 2002, the American Bar Association (ABA) promulgated black letter guidelines titled, *ABA Ten Principles of a Public Defense Delivery System*, that provide national standards for ensuring quality, independent indigent criminal defense representation. *See* Appendix I.<sup>1</sup> Furthermore, the statute enacting and authorizing MCILS requires the Commission to promulgate seven standards to govern the delivery of indigent legal services, including “standards for the evaluation of assigned counsel and contract counsel.” 37 M.R.S. § 1804(2)(D) (2009).

Due to limited staff and resources, Maine has been unable to develop the robust system of performance evaluations and standards contemplated by *Principle Ten* requiring that “defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.”<sup>2</sup> Not surprisingly, however, many states around the nation are not in compliance with at least one of the Ten Principles set forth by the ABA.<sup>3</sup>

The Sixth Amendment to the United States Constitution provides for the right to counsel in criminal cases. In 1963, the Supreme Court in *Gideon v. Wainwright* declared that “in our

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<sup>1</sup> The ABA’s *Ten Principles* are applicable to all aspects of indigent legal services, including adult criminal and juvenile defense, child protective cases, and other cases in which an indigent person has a right to representation at state expense.

<sup>2</sup> “The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency,” *ABA Ten Principles of a Public Defense Delivery System*, including commentary, 2002.

<sup>3</sup> For instance, many jurisdictions’ public defense systems are not independent from political interference (Fresno County, California; *See* Sixth Amendment Center, David Carroll, September 29, 2013), lack parity between defense counsel and the prosecution (*See* ABA *Principle 8*, Appendix I), and do not provide continuous representation of clients by the same attorney until completion of their case (*See* Sixth Amendment Center, Jon Mosher, July 2, 2014).

adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. *This seems to us to be an obvious truth.*” *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963, emphasis added). Since 1963, the Supreme Court has further added that the defendant must not only be represented by counsel, unless the defendant waives her right, but that there must be *effective* representation by counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984).

The potential consequences of a failure to supervise and provide systemic review of indigent defense counsel can be seen in a Sixth Amendment Center report titled, “The Delaware Report” (2014). The report on Delaware’s indigent defense system concluded that a pervasive lack of accountability, in addition to excessive caseloads, had created “systemic deficiencies prevent[ing] those defendants who manage to invoke their right to counsel from getting adequate representation.” *The Delaware Report*, The Sixth Amendment Center, Executive Summary, page v (2014) (emphasis added). As such, the Sixth Amendment Center found that ABA *Principle Ten* is one of the most important and yet, often lacking, mechanisms to ensure constitutionally mandated legal representation, as well as *quality* legal counsel for indigent defendants in the criminal justice system.<sup>4</sup>

In addition to input from two national public defender organizations (NLADA and the Sixth Amendment Center), my research included a survey of thirteen states’ systems of indigent defense representation and attorney evaluation, with the goal of designing a system of attorney performance evaluation that would ensure efficient, independent, and high-quality representation throughout the State of Maine. For the purposes of this report, I have organized the surveyed

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<sup>4</sup>The “Delaware Report” concluded that, while most states are better situated than Delaware, Delaware’s system failed to meet the majority of the ABA’s *Ten Principles*, designed to “provide the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” *The Delaware Report*, Sixth Amendment Center, III-IV (2014); *see also Ten Principles of a Public Defense Delivery System*, American Bar Association (2002).

states based on how each state evaluates attorney performance.<sup>5</sup> I will begin with a brief summary of each state's system for delivery of indigent legal services and then describe how that state implements their system of attorney performance evaluations.

## **B. Survey Systems**

Survey systems for conducting attorney evaluations can be designed to gather as little or as much information about attorneys' performance as a Commission or an Office of the Public Defender (OPD) requires. The following systems are the best examples of a pure survey method used to gather information and evaluate attorney performance.

### New Hampshire

New Hampshire's Indigent Defense Fund currently employs a Public Defender system for indigent representation supplemented by the Judicial Council contracting with private attorneys for conflict cases.<sup>6</sup> New Hampshire's Public Defender offices (NHPD) conduct annual attorney evaluations for all staff and private contract counsel, performed by the managing attorney or evaluator and reviewed in-person with the surveyed attorney. According to the NHPD Evaluation Guidelines, the primary purpose of the performance evaluation is to "improve the quality of client representation and assure the professional development of our attorneys . . . . It is an opportunity to recognize achievements and set goals for future progress and continued professional development."

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<sup>5</sup> Additionally, I compiled an Appendix of sample attorney performance evaluation methods as well as helpful documents that can be used to monitor a state's overall indigent defense system.

<sup>6</sup> New Hampshire's Judicial Council is a twenty-four person board, comprised of members appointed by all three branches of the government, that provides oversight and guidance for the Indigent Defense Fund.

Survey question topics include: organizational skills, client relationships, advocacy skills, case load management, motion practice, and professional development. Attached to the attorney evaluation form is a set of guidelines that provide a brief summary of what the evaluating attorney should look for as a “general aide and not as an exhaustive list of all considerations applicable.” Finally, the last question on the survey form is an attorney self-evaluation question designed to be completed at the evaluation review, requiring the attorney to “reflect on personal and professional development” and identify their individual “needs or desires” with NHPD. The responses to survey questions are limited to comments and whether the attorney “meets expectations” or displays “room for growth.”

#### Vermont

Vermont uses a county-based Public Defender system that contracts with private counsel to help with caseload relief, as well as on an *ad hoc* basis for conflict cases. In order to conduct performance evaluations of both in-house public defenders and contract counsel, Vermont conducts anonymous surveys of attorney performance by soliciting input from magistrates, judges, and justices using *LimeSurvey*, an online survey system. The questions are first drafted in a Word document, uploaded to the *LimeSurvey* system, and then sent to requisite judicial officers in four month cycles. The OPD conducts evaluations for both criminal matters in the district courts, as well as family law matters. However, in-house counsel, contract counsel, and *ad hoc* counsel do not complete a self-evaluation.

The online survey includes a numeric rating scale, ranging from number 1, indicating no information, to number 7, indicating consistently superior performance. The survey questions address: motion practice and legal knowledge, courtroom skill, plea bargaining and sentencing,

and professionalism, with relevant differences for district court criminal cases and family law matters. Every four years, the OPD compares the individual attorney performance evaluations to determine areas of improvement and to note areas of successful, positive professional growth or change.

According to Mary Deaett at the Vermont Office of the Public Defender, judicial officers are targeted because they spend the most time interacting with and observing OPD attorneys, and the Office sends anonymous evaluations to the judicial officers that attorneys appear before most frequently seeking constructive feedback on attorney performance. Ms. Deaett did state that it is incredibly important to the participating judicial officers that the attorney evaluations are conducted anonymously so as to ensure OPD and attorney independence from the judicial branch.

### **C. Standards of Practice Model**

The following states employ a Standards of Practice model for conducting attorney performance evaluations. Under this model, a jurisdiction designs Standards of Practice unique to each case type (e.g. criminal, juvenile, emancipation, civil commitment, serious violent felony/capital cases, etc.) that each appointed or contracted attorney must review and follow to remain eligible to represent indigent clients. The Maine Commission on Indigent Legal Services has currently adopted Practice Standards for the following case matters: Chapter 101 - Juvenile, Chapter 102 - Criminal, and Chapter 103 - Child Protective.

#### District of Columbia (D.C.)

The District of Columbia uses a Public Defender system, in addition to a panel of private assigned attorneys who are managed by the Superior Court's Criminal Division, to provide

representation in misdemeanor cases. Under this panel system, individual judges/justices are responsible for acting on voucher payment requests, as well as periodically reviewing attorney panel renewals and new assignment applications. Under D.C.'s system, private paneled attorneys are appointed by the court to represent clients facing only "less serious" misdemeanor or regulatory offenses, while staff public defenders handle all other "more serious" cases, including but not limited to sex offenses, violent crimes, and felony matters.

In 2003, the Superior Court formed a Representation Committee to develop criminal defense practice standards with the goal of maintaining "the highest level of representation in all Criminal Division matters." In January 2010, by Administrative Order 10-02, the D.C. Superior Court adopted *Attorney Practice Standards for Criminal Defense Representation*, as well as practice standards for family court matters, including juvenile and special education representation. The Practice Standards were developed based on D.C.'s Rules of Professional Conduct and the D.C. Superior Court Rules of Criminal Procedure. The Criminal Defense Practice Standards include requirements for attorney appointments and trainings, basic functions of defense counsel, attorney-client relationship, pre-trial actions, hearings, trial preparation, sentencing, post-conviction advocacy, and appeals. It is unclear how the District of Columbia ensures attorney compliance with these Standards.

### Louisiana

Louisiana uses a parish-based public defender system to provide indigent criminal defense representation. However, Louisiana does not currently have an assigned counsel system in any parish. As such, the majority of the State provides indigent criminal defense representation using a hybrid system of parish public defender offices, as well as private

attorneys working either part-time or full-time under contract with the PD office. In 2007, the Louisiana Public Defender Board (LPDB) was established as an administering state agency to serve the public by providing representation for clients pursuant to their constitutional right to counsel.

LPDB's mission is to provide high quality and constitutionally mandated representation of indigent defendants through a "commitment to performance standards, ethical excellence, data-driven practices and client-centered advocacy." In order to evaluate contracted attorneys' performance, LPDB established performance standards for capital cases and trial court cases for the following matters: delinquency, criminal, and CINC (Child in Need of Case and Termination of Parental Rights cases). These standards are designed and intended to "provide a measure by which the performance of individual attorneys and district public defender offices may be evaluated, and to assist in training and supervising attorneys . . . . The language of these standards is general, implying flexibility of action which is appropriate to the situation." The Trial Court Performance Standards for criminal matters include guidance on the duties and obligations of counsel, how to conduct investigations, filing pretrial motions, plea negotiation information, trial preparation, sentencing and the appeal process, and defending juveniles prosecuted as adults.

As stated earlier, LPDB designed these Standards of Performance to provide flexible guidelines for attorneys, ensure quality legal representation, and establish a means by which LPDB can measure performance. While these Standards do provide for a certification process, it is unclear how the Louisiana Public Defender Board ensures attorney compliance with these Standards.

## Virginia

Virginia's indigent defense system is comprised of statewide public defender offices for non-capital and capital cases, as well as court-appointed counsel provided by Virginia's private criminal defense bar. Attorney performance is monitored by the Virginia Indigent Defense Commission (VIDC). The VIDC also sets the legislatively mandated Standards of Practice for both public defenders and court-appointed counsel.

In order for a private attorney to be rostered for indigent criminal defense representation, she must be in good standing with the Virginia State Bar and complete the certification process that includes meeting the training and experience qualifications. Once an attorney is placed on the roster, an attorney's failure to comply with or violation of the Standards can result in the attorney's removal from the roster and, depending on the violation, can be reported to the Virginia Bar.

The VIDC has established Standards of Practice for non-capital criminal cases, as well as for Appellate Practice and Juvenile Defense. The standards for non-capital criminal cases are organized into the following sections: duties, training, and experience of counsel, pre-trial release, preliminary hearing and counsel's continuing obligation to raise the issue of client's incompetence, discovery and investigations, pre-trial motions, plea negotiations, trial, sentencing and appellate procedural matters.

The comprehensive Standards are enforced using a Five-Step complaint-based process and a mandatory recertification process. The process for enforcing the standards begins with submission of a "qualified" complaint that must be in writing, must not be anonymous, and must involve a court-appointed attorney or public defender in an indigent defense case, amongst other

requirements. A qualified complaint is evaluated to determine whether clear and convincing evidence of a violation exists by the VIDC Standards of Practice Enforcement Attorney (SOPEA), who is responsible for investigating the complaint and preparing an Investigative Report. Next, the report is submitted to a three-member Informal Resolution Panel (IRP) consisting of licensed Virginia attorneys who may pursue one of the following three options: issue a formal determination and dismiss the complaint; request more information; and/or schedule a formal agency hearing with the respondent attorney. If a formal hearing is required, the hearing will be recorded and conducted by three Virginia Bar members chosen from a committee of volunteer attorneys who may issue a sanction if necessary. The respondent attorney may appeal any sanction imposed to a three-person VIDC panel.

One should note that, although there is a comprehensive procedural review of complaints about attorney performance by VIDC, there is no routine system-wide evaluation of attorneys. Rather, the VIDC only takes disciplinary action against an attorney pursuant to the qualified complaint procedure. However, a judge or justice may choose not to appoint a particular attorney if she believes the attorney is incompetent.

#### **D. Data Collection Systems**

The use of data to assess attorney performance by tracking case outcomes, pretrial data, case types, average imposed sentences, and the method of disposition is a relatively new development throughout the country. North Carolina and Travis County (TX) are two systems conducting cutting-edge data collection and synthesis for the purposes of monitoring state-wide indigent defense representation.

## North Carolina

North Carolina currently uses a county-based hybrid system comprised of public defender offices, appointed counsel, and contract counsel (for conflict and/or relief cases). The Office of Indigent Defense Services (IDS) has adopted Best Practices and Performance Guidelines for non-capital criminal cases, juveniles in delinquency proceedings, and parent respondents in abuse, neglect, dependency, or TPR proceedings.

Recently, IDS has developed the North Carolina Systems Evaluation Project (NCSEP), headed by Margaret Gressens, with the primary purpose of using “empirical data to measure quality, assess policy, and to improve the indigent defense system by determining how well the system meets the needs of clients, the criminal justice system as a whole, and the community.” Although North Carolina’s indigent defense system is county-based, IDS collects statewide data from all IDS attorneys, as well as directly from the Judicial Branch. To process the large amount of data collected, IDS uses specialized software, staff proficient in economics and statistics, and a server warehouse for data storage.

To monitor attorney performance, North Carolina has developed Key Performance Indicators (KPIs)—defined jurisdiction-specific goals and objectives that are subsequently distilled into measurable performance indicators.<sup>7</sup> In order to create the KPIs, NCSEP organized a committee of members from the criminal justice community to determine community values that were important to measure and track, some examples of which include: case types, sentence faced versus sentence received, cost of case, number of cases handled by each attorney, and the

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<sup>7</sup> NCSEP developed 7 KPIs: (1) access to attorney, (2) client outcomes, (3) quality of representation--regardless of race, gender, ethnicity or income, (4) wrongful convictions, (5) efficiency, (6) comprehensive representation, and (7) accountability to taxpayers.

method of disposition.<sup>8</sup> Based on the success of data collection for case types and attorney performance, North Carolina has expanded their current system to include pretrial data analysis as well.

North Carolina has also partnered with the NLADA to publish their “data toolkits” online in order to provide a resource for other jurisdictions interested in organizing, collecting, and evaluating data, as well as ways in which data can inform and improve attorney performance.<sup>9</sup> By collecting state-wide data, regardless of whether representation was provided by a public defender, private assigned counsel or contract counsel, North Carolina is able to analyze a rich source of information. According to the NLADA, some of the internal uses of data can include: “conduct intake and perform conflict checks, continuously monitor and manage workload, track case outcomes, document exactly what is done for clients and when, develop and apply workload standards and case weights, track attorney, social workers’ and investigators’ time, manage with clear expectations and performance measures.”<sup>10</sup> Using data collection, IDS has been able to monitor, cross-tabulate, and improve attorney performance, as well as provide informed policy recommendations to the legislature regarding North Carolina’s system of indigent criminal defense representation.

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<sup>8</sup> Recommended members of the KPI Committee include: judges and justices, criminal defense attorneys, prosecutors, assistant attorney generals, law professors, and non-profit service providers most frequently used by indigent defendants.

<sup>9</sup> Link to NCSEP Toolkit for Performance Measures:

[http://www.ncids.org/Systems%20Evaluation%20Project/PerformanceMeasures/PM\\_Links.htm](http://www.ncids.org/Systems%20Evaluation%20Project/PerformanceMeasures/PM_Links.htm)

Link to NCSEP Toolkit for Building Data Infrastructure:

<http://www.ncids.org/Systems%20Evaluation%20Project/Infrastructure/links.htm>

Link to NCSEP Pilot Site Project:

<http://www.ncids.org/Systems%20Evaluation%20Project/Projects/PilotSite.pdf>

<sup>10</sup> *Basic Data Every Defender Program Needs to Track: A Toolkit for Defender Leaders*, NLADA, prepared by Marea Beeman, page 15 (2014); <http://www.ncids.org/Systems%20Evaluation%20Project/Projects/PilotSite.pdf>

## Travis County (TX)

On March 28, 2015, the NLADA and Travis County hosted a webinar on how Travis County changed their system of indigent defense representation from a court-appointed “wheel” model, where judges rotated eligible rostered attorneys based on qualifications and appointment eligibility, to a structured non-profit private defender model.<sup>11</sup> The radical change in indigent defense systems was necessary because Travis County was not in compliance with most of the ABA’s *Ten Principles*. The primary areas of concern were the lack of independent representation, the lack of parity of resources between the defense and prosecution, and the lack of systematic review and supervision of defense attorneys for quality and efficiency. The 2011 reform led to the creation of the Capital Area Private Defender Service (CAPDS) to provide oversight and management of the representation system. *See Appendix X.*

CAPDS, in turn, created a data collection system, collaborating with North Carolina, to serve three important functions: “evaluation, management, and advocacy” of the criminal defense system. CAPDS established a “Values Committee” (similar to NCSEP’s Key Performance Indicator Committee) comprised of members of the local defense bar, the judiciary, policy makers, and members of the Texas Indigent Defense Commission (TIDC). The values committee developed approximately 60 total measures (only about half are in use today) or “values” unique to Travis County.

For instance, one of the values identified by the CAPDS Value Committee was “Competent Representation.” To collect data for this specific value, staff distilled the value into “goals,” such as “clients receive competent representation.” This goal was narrowed into

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<sup>11</sup>Link to the webinar documents, including a YouTube video and pdf document, hosted by the NLADA and Travis County, <http://tidc.texas.gov/media/37799/150520nladawebinar-travismac-.pdf>

objectives, such as “counsel meets with clients in timely manner” or “type and timelines of meetings,” that could be measured by collecting data on attorneys’ case outcomes, including the time spent on an individual case, the amount of time an attorney spent on writing briefs/motions, or the amount of time an attorney spent meeting with a client.<sup>12</sup> Therefore, by tracking data objectives such as convictions, trials, sentence length, impact of pretrial release, and cases overturned on appeal, etc., CAPDS has been able to qualitatively monitor large amounts of system information that allows Travis County to identify and implement necessary changes.

### New York

A third example of a data collection method is New York’s county-based Public Defender model. Under this system, a county’s Public Defender Office contracts with private counsel for case relief and conflict matters, resulting in approximately 150 state-wide private counsel “providers” for appellate, criminal defense, and family law cases. Pursuant to the New York State Bar Association Standards and Executive Law Article 30 Section 832(3)(d), establishing the New York Office of Indigent Legal Services (ILS), ILS developed Standards and Performance Criteria for public defenders and contracted private counsel. In addition to Standards and Performance Criteria for evaluating attorney performance, the Office of Indigent Legal Services conducts random in-court observations but does not review case files or briefs due to concern regarding attorney-client privilege.

New York is in the early process of developing a state-wide data collection system to evaluate attorney performance and monitor caseloads. Andy Davies, at ILS, coordinated with

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<sup>12</sup> Much of the success of the data collection system, due in part to highly knowledgeable data retrieval staff, is the ability to access court data from the period *before* the 2011 indigent system reform. CAPDS has been able to conduct a “before-and-after” comparison of data variables by analyzing attorney performance and the success of the current system of indigent legal services as compared to the pre-2011 system.

NCSEP to develop Key Performance Indicators (*see* North Carolina) specific to New York.<sup>13</sup> In New York City, however, the Legal Aid Society, uses a pure data collection system by recording case data from the City of New York computers that populates into the Society’s system as a “one-way street” data flow for attorney-client privilege protection. However, Mr. Davies noted that court-provided data often does not have all the information a jurisdiction may want to collect.

### **E. Hybrid Systems**

The following states are examples of defender systems that use a hybrid method of attorney performance evaluations. For instance, some states use a combination of in-court monitoring and in-person evaluation reviews (*see* Colorado and San Mateo) while other states use performance standards, surveys, financial audits, in-person evaluations, and data collection to monitor a jurisdiction’s attorneys’ performance. *See* Oregon and Massachusetts.

#### Colorado

Colorado’s indigent defense system is comprised of county-based public defender offices that work with the Alternative Defense Counsel (ADC) to contract with Colorado’s private bar to handle conflict cases (“cases in which the public defender office determines that an ethical conflict of interest exists”). The Colorado Office of the State Public Defender is comprised of 21 regional offices, one centralized administrative office, and one centralized appellate office that is responsible for handling statewide appeals.

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<sup>13</sup> See Appendix VI for a copy of a working document Andy Davies’ (New York) developed to include on attorneys’ voucher submissions in order to track identified performance measures.

I spoke with Lindy Frolich at the ADC to determine how Colorado monitors private contract counsels' performance. According to Ms. Frolich, the ADC conducts contract renewals of private counsel every three years. Each year, the ADC reviews roughly 130 contract renewals for a total of approximately 400 ADC attorneys. The ADC conducts a Performance Plan review with each contract renewal, comprised of seven basic components beginning with mandatory evaluations for both private attorneys and contracted investigators. The ADC's renewal application requires attorneys to respond to questions such as describing two ADC trials or significant cases completed in the last two years, providing a filed motion or brief for review, documenting how frequently the attorney uses the ADC Brief and Motion Bank, identifying the percentage of cases in which the attorney used an ADC investigator, and documenting the number and type of CLE courses taken over the past three years related to either criminal or juvenile law.

In addition to requiring attorneys to file a contract renewal form, the ADC conducts random in-court observations at both the trial and appellate levels, reviews pleadings, surveys courts for input on attorney performance, and reviews attorneys' billing practices from the last three years for financial discrepancies. Furthermore, the ADC provides all contracted attorneys with access to a Motions and Briefs Document Bank that is routinely updated with complex and commonly used documents, as well as access to comprehensive manuals on most frequently addressed subject matters such as character evidence, self-defense, and juvenile cases. ADC has also created a formal complaint procedure that allows any client to file an attorney complaint with the ADC, and every client complaint must be reviewed by the ADC *before* they will renew an attorney's contract. Finally, as of April 2013, ADC private attorney contracts provides for "at will termination," regardless of the formal complaint procedure.

## Massachusetts

Massachusetts currently has a state-wide public defender system (the “Office of Public Counsel;” OPD), including divisions for mental health and juvenile cases, that contracts for panel appointments with county-based private attorneys. Nancy Bennett, Deputy Chief Counsel of the Private Counsel Division, established and implemented a process for conducting attorney performance evaluations, beginning with a certification process for panel appointments. In addition to the performance evaluations, the Central Office of Public Counsel also conducts financial audits of paneled attorneys’ billing practices in accordance with the “Assigned Counsel Manual: Policies and Procedures.”

In order for an attorney to be panel certified, the attorney must complete either a seven day training program or meet the certification experience requirement (e.g. has tried five criminal jury cases as lead counsel in the last five years), and apply for membership to the local county board, which is responsible for conducting the initial interview. If the local county board finds that an attorney meets both the skill (objective) and reputation (subjective) requirements, the attorney is placed on probation for up to eighteen months with no right to appeal. During this probationary period, a performance assessment of the attorney is conducted by the Local Advisory Board, comprised of local attorneys and a staff attorney from the OPD Central Office.

Massachusetts has also established a system of paid, local Supervising Attorneys to provide in-person monitoring of paneled attorneys. The Supervising Attorney (SA) position as a “position of honor,” encouraging the Supervising Attorney to focus on the welfare of indigent clients over their social relationships with local attorneys. At least one Supervising Attorney is designated in each county, with more SAs in more populous counties. To apply for the

Supervising Attorney position, an applicant must be currently rostered for Superior Court cases and be interviewed by a local advisory board. The advisory board will forward its recommendation to the Chief Counsel, who either approves or rejects the applicant. The OPD contracts with Supervising Attorneys for ten hours per week at \$60.00 per hour for one year.<sup>14</sup> SAs are required to meet with private counsel monthly to review case files, motions, briefs, etc., in order to look for objective indicia of an attorney's good performance and areas needing improvement, and to prepare Performance Assessment reports. The SA's monthly Report is submitted to and reviewed by Central Office attorneys.

According to Ms. Bennett, Massachusetts currently has twenty-seven county-based Supervising Attorneys, with numbers increasing every year, who oversee approximately 1,800 private assigned attorneys and maintain an average of part-time hours on assigned cases. Calculated according to full-time employee numbers, there is approximately one Supervising Attorney for every thirty-three private attorneys (keeping in mind that more populated counties require multiple SAs). Ms. Bennett stated that a system of local part-time Supervising Attorneys is more efficient because the SAs are locally connected and have established professional relationships throughout the county (e.g. court clerks) who can alert them to attorney performance problems.

Additionally, Supervising Attorneys are required to conduct primary investigations of client complaints. The Private Counsel Division's client complaint process uses a collect-call phone service, answered by administrative personnel under the Private Counsel Division's guidance, to provide clients, especially illiterate or imprisoned defendants, with direct access to

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<sup>14</sup> Note, according to Ms. Bennett, Supervising Attorneys are paid out of the same fund as panel attorneys since work performed by SAs are part of the OPD's operating costs.

the complaint process. The Division's most common type of client complaint relates to their attorneys' failure to meet with them in prison. Ms. Bennett cautioned against relying too heavily on client complaints given the potential for inaccurate information, but stated that client complaints can be a great source of information about attorney performance problems if determined to be credible. While Massachusetts' system of private counsel performance evaluations does require increased personnel and financial resources, taxpayers benefit from enhanced accountability and quality of representation.

### New Mexico

New Mexico currently uses a public defender system that also contracts with private attorneys to provide representation in criminal cases. Currently, New Mexico is in a development phase (Request for Proposals; RFPs) to implement a more comprehensive attorney performance monitoring system. However, amongst the RFPs is a sample annual evaluation conducted using a point-based system: thirteen factors are considered at twenty points per factor for a total of 260 points available. Effective May 2, 2014, the New Mexico Public Defender Commission (NMPDC) published Performance Standards for Criminal and Juvenile case types that are built into private counsel contracts. Included in the Performance Standards are requirements regarding evaluations (to be conducted "at least annually"), as well as periodic supervision and evaluation of contracted private counsel's "first contact with a new client, use of investigators and experts, trial outcomes, motions on substantive issues and outcomes, courtroom evaluations, and dismissal or nonconviction dispositions."

## Oregon

Oregon uses a 100% state funded, private assigned counsel system managed by the Office of Public Defense Services (OPDS) with oversight provided by the State Public Defense Services Commission. In each county, private assigned counsel are contracted through private law firms, consortia, or non-profit public defender offices called “providers.” In order to evaluate private assigned counsels’ performance, the OPDS formed an advisory group called the Quality Assurance Task Force (QATF) to develop practices for “monitoring and improving the quality of public defense services in Oregon.” In part, the QATF developed eight Best Practices that serve as recommendations for all providers. These best practices are: “client-centered practice, forming a board of directors, quality assurance, case assignment, information management, facilities that instill pride and confidence in the work, collaborative efforts with the community, and civic engagement.”

In addition to the QATF Best Practices, the OPDS currently uses multiple performance evaluation methods to monitor multiple types of performance indicators. These systems are: an online survey of counsel, in-person audits of providers in every county by Peer Review Teams (PRTs) comprised of volunteer lawyers, a Service Delivery Review conducted by Commissioners, and finally, a newly implemented data collection system.

Beginning with surveys, the OPDS uses *Survey Monkey*, an online survey platform, to query all organizations that have frequent contact with OPDS providers, such as the District Attorney’s Office, the Attorney General’s Office, the Courts, the Department of Health, and the Department of Corrections. These surveys are sent annually and, according to Nancy Cozine the Executive Director of OPDS, only after the Chief Justice of the Oregon Supreme Court has sent

a preliminary message to participating organizations highlighting the importance of participating in the survey and providing thoughtful, serious responses. *See* Appendix XI.

OPDS' most labor-intensive method of performance evaluations is the in-person audits of providers in every county. Peer Review Teams conduct interviews with organizations that most frequently interact with providers, and issue a final report and recommendation to the Service Delivery Review Board (SDRB), comprised of OPDS Commissioners, detailing changes in providers' cases, performance, and the use of interpreters and investigators.

After the PRTs issue their final recommendation to the Service Delivery Review Board, the SDRB Commissioners conduct a Review of the providers' performance one year after the PRT recommendation was issued in order to allow attorneys to make the changes. The SDRB Review is a formal process that is open to the local public and allows for testimony by providers and local interested community members. Therefore, this review process functions like an administrative or agency hearing. After the public review hearing, the Service Delivery Review Board can terminate a provider's contract if the attorneys have not changed their performance based on the Peer Review Team's recommendations.

Finally, OPD has implemented a data collection system based on the toolkit made available by North Carolina and the NLADA. OPDS has implemented a data system that will be capable of interfacing with the courts' data system for one-way data retrieval. Additionally, according to Ms. Cozine, providers also send individual records to OPDS to track variables. Regarding staff requirements, OPDS currently has one staff person working on the data collection, synthesis, and validation of each field, but they do have an IT manager who understands data collection. One example of how OPDS uses data collection is to track

attorneys' time spent, which can be indicated by the frequency and length of attorneys' client meetings. As such, OPDS can track this variable to determine if providers are meeting OPDS' goal of "one-third time spent," divided between in-court appearances, client meetings, and researching/writing.

### San Mateo County (CA)

California currently employs a county-based system for indigent defense representation. One of the leading models for assigned counsel representation is San Mateo County. San Mateo County uses a pure private defender model managed by the San Mateo Bar Association, under contract with the County ("Agreement"), to assign private attorneys (Private Defender Program; PDP) to indigent defendants. Part of the Agreement requires the bar association to develop and implement a mentoring program for new attorneys, as well as to conduct annual evaluations of private defenders and disclose the evaluation results in the San Mateo County Annual Report. Included in the attorney evaluation standards are assessments of each lawyer's professional ability, attitude, legal knowledge and preparation, work habits, and communication skills. However, each year the association weights factors they believe to be the most important in their jurisdiction; the 2014 Evaluations emphasized the effective use of investigation, willingness to try cases, effective use of legal research and pretrial motions, CLE training, and consideration of immigration issues.<sup>15</sup> *See also* Appendix IX.

The PDP Evaluation Standards provide for a number of factors listed under three primary headings: Professional Ability, Professional Attitude, and Professional Relations. Additionally, part of the PDP annual attorney evaluation process requires the evaluator to actively participate

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<sup>15</sup> *See* Annual Report Fiscal Year 2013-2014, page 43, by Chief Defender John S. Digiacinto, to the Board of Supervisors San Mateo County, San Mateo County Bar Association Private Defender Program.

in reviews by conducting in-person court observations, brief and motion reviews, and ensuring contracted private attorneys complete self-evaluations. However, it is unclear how the San Mateo Bar Association staffs for and conducts the in-person evaluations or the in-court observations.

## **II. Analysis & Assessment**

Based on my research, a majority of the reviewed states' systems for attorney performance evaluations were continuously modified throughout the implementation process. Assessing the states systems discussed above, I have divided the above states' systems into the following categories: models that best provide comprehensive attorney performance evaluations, models that provide the minimum performance monitoring, and models that are adequate but need improvement.<sup>16</sup>

### **A. Comprehensive Performance Evaluation Models**

Comprehensive performance evaluation systems, such as those found in Colorado, Massachusetts, North Carolina, Oregon, and Travis County (Texas), best address the complex legal issues facing indigent defendants and, therefore, provide the most effective method to monitor attorney performance and ensure high quality legal representation.

Massachusetts' hybrid system provides a detailed approach to monitoring attorneys' performance, regardless of whether counsel is privately assigned or contracted. The advantages of this model are substantial community involvement and investment in monitoring attorneys' performance, particularly the use of local Supervising Attorney positions. The Supervising

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<sup>16</sup> Of the above researched states, I decided to exclude Louisiana and New York from my analysis and assessment. New York is in the process of constructing and implementing a data collection system. Louisiana, while using Standards of Performance, has provided me with little information as to how they conduct attorney performance evaluations. However, I greatly appreciate Andy Davies communications and suggestions for how to best develop and implement a performance evaluation system in Maine given the current system of private assigned counsel.

Attorney provides the local community with an immediate form of oversight and direct mentoring of attorney performance conducted by highly experienced and well-respected members of the local bar through in-depth review of casefiles, motions and briefs, and in-person court observations. Of course personnel and financial resources are necessary to operate a system of supervising attorneys who conduct in-person interviews, submit reports, and investigate client complaints. These costs, however, are outweighed by the benefit provided to the community and represented indigent defendants.

Oregon operates a hybrid system very similar to that of Massachusetts. Oregon, however, also conducts system-wide evaluations as well as individual attorney evaluations. One of the key differences between the two states is Oregon's reliance on volunteer attorneys from the community to comprise the Peer Review Teams as opposed to contracting with thoroughly vetted counsel for that purpose (Massachusetts). While this model certainly has advantages, such as ensuring community investment in increasing the quality of representation, the primary disadvantage is the potential difficulty getting well-trained, competent, and non-biased individuals to conduct *volunteer* performance interviews of attorneys, especially if the interviews are conducted as a result of client complaints. However, Oregon's Public Defender Office has the benefit of developing and implementing a new data collection system, and its use of surveys (via *Survey Monkey*) provides a low-cost and easy-to-use method for obtaining feedback from organizations that routinely interact with private assigned counsel.

Although Oregon's data collection system is still in the development phase, the benefits of receiving rich information about the indigent defense system and attorney performance are reflected in the North Carolina and Travis County approach. Furthermore, the benefits of a data system certainly seem to outweigh the costs of software and the personnel requirements,

including but not limited to: financial auditing, attorney performance monitoring, caseload and workload assessment, predictability of case volume, efficient cross-tabulation of information across the state, and objective measurements (including graphics) that can positively influence policy decisions. It is important to note that, while North Carolina has been perfecting their data system for years, Travis County restructured their entire indigent defense system in 2011 starting the data collection process shortly thereafter.

As previously stated, North Carolina and the NLADA have published online toolkits as a resource for jurisdictions interested in developing a data collection system that is cost-efficient and relatively easy to navigate. Therefore, the foreseeable costs associated with implementing a data collection method are likely to be personnel and software/data server costs. Other potential disadvantages of data collection include the length of time it would take to implement the system (likely a year at least), the difficulty of monitoring and evaluating issues at the local level, and the need to ensure a close relationship with the Judicial Branch for ease of information access.

Finally, Colorado provides a very cost-effective yet comprehensive model for performance evaluations by requiring a contract renewal process, including in-person court observations, court surveys, brief and motion review, and financial audits. Under Colorado's system, all evaluation types are conducted every three years during the mandatory attorney renewal cycle. However, the system requires substantial personnel resources to conduct in-person attorney performance evaluations and the use of survey results from judicial officers could undermine the independence of an indigent defense system.

## **B. Adequate Performance Evaluation Models**

Virginia's model and San Mateo's model provide adequate evaluations of attorneys' performance. Standards of Practice can be as complex as required and are easily modified for a specific jurisdiction or case type with a minimal amount of staff and implementation costs. Furthermore, the addition of a formal complaint process, together with comprehensive standards of practice, increases both real and perceived accountability of attorneys to their clients and taxpayers. Finally, an agency hearing and review process based on the standards of practice provides for a meaningful review and the availability of disciplinary actions.

San Mateo's guidelines for attorney evaluations do provide a value-laden process that requires in-person monitoring and establishes an accountability procedure. Based on my research, however, it is unclear how the San Mateo Bar Association practically implements and conducts the evaluations, i.e., who conducts in-person court observations, what are the guidelines for the review of submitted briefs and motions, and what are the ramifications if an attorney fails to meet these operative standards.

## **C. Minimum Performance Evaluation Models**

The District of Columbia, Vermont, New Hampshire, and New Mexico are states that provide the minimum structure necessary to monitor attorneys' performance. Concerns with these models are the risk that comprehensive feedback on attorney performance will not materialize and the lack of independence if the judiciary is involved (even anonymously) in attorney evaluations. Furthermore, relying only on a client complaint process is not the most effective way of monitoring attorney performance because attorney oversight comes too late in the process, primarily because the problem has already occurred.

The District of Columbia Standards of Practice model, enforced by Superior Court Justices, is an excellent tool for providing guidelines for newly paneled private attorneys. The Standards can be compiled with input from various organizations and groups in the local criminal justice community, including judicial officers, prosecutors, defense attorneys, and client-centered non-profits. However, the disadvantage to adopting a pure Standards of Practice Model for evaluating attorney performance is the lack of direct systemic oversight. It is unrealistic to assume that rostered attorneys would follow the Standards of Practice like the Rules of Evidence, especially the more experienced criminal defense attorneys. However, the Standards do provide initial practice guidelines and can be used to identify jurisdiction-specific practice areas that need further improvement.

Vermont's survey system provides a simple format and structure that can be adapted to any jurisdiction and practice area, requiring minimal staff and operating costs. One of the advantages to using a survey system is that the survey document can be routinely modified online using either *LimeSurvey* (Vermont) or *Survey Monkey* (Oregon) at a reasonable financial cost.<sup>17</sup> Vermont, for example, sends out online surveys in four month cycles to judges and justices for anonymous review of attorneys at the district court level (only criminal matters) and for family court cases.

Alternatively, New Hampshire's evaluation forms provide similar benefits as Vermont's online survey system. In New Hampshire, unlike in Vermont, the Judiciary does not participate in the evaluations. Rather, a supervisor will meet with the attorney and complete the evaluation

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<sup>17</sup> *LimeSurvey* will allow for up to 10 responses for free or for \$25 per month up to 100 responses. *Survey Monkey* provides up to 100 responses for free, for \$26 per month up to 1,000 responses and for \$300 per year an unlimited amount of response plus graphics, syncing to other data systems (e.g. SQL/SPSS), and allows for cross-tabulation.

form with the attorney participating in a “self-evaluation” portion. This method gives the New Hampshire system an advantage by retaining system-wide independence from the Judiciary.

Finally, New Mexico’s hybrid system of Standards of Practice and proposed point-based evaluations provide a good basis for further developing attorney performance standards. However, I would caution that using a point-based system that reduces assessment of an attorney’s performance to a purely subjective numeric scale could create problems with attorneys if they believe that their performance is reviewed on an arbitrary basis. Therefore, it is important to communicate to attorneys that the evaluations are *one aspect* of the performance review system, providing a baseline report of attorneys’ successful practices as well as areas that need improvement.

### **III. Recommendations**

Currently, Maine’s indigent legal services system provides representation almost exclusively through the use of private assigned counsel, with oversight provided by the Maine Commission on Indigent Legal Services (Commission).<sup>18</sup> As a state agency, the Commission owes a duty to taxpayers and indigent clients to ensure that assigned counsel provide the highest quality legal representation possible throughout Maine. To inform my recommendations, I have created a list of subsidiary goals that any system of performance evaluation should pursue to enhance the overall quality of indigent legal services.

The goals of the recommended systems are: to provide that each attorney meets with their client as early as possible and keeps their client properly informed of her case; to provide for and monitor appropriate caseloads that do not overburden assigned counsel; to provide that issues are

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<sup>18</sup> One exception to Maine’s exclusive system of private assigned counsel is Somerset County where the Commission contracts with private counsel for criminal and juvenile cases.

appropriately addressed *before* complaints are filed; to provide that attorneys are appropriately qualified and experienced for the requisite assigned case type; to provide that performance guidelines are adhered to by attorneys providing indigent legal services; to provide that rural counties receive similar high quality representation as the more densely populated counties; and finally, to provide for feedback from the criminal justice community regarding attorney performance, pretrial resources, and developing legal issues that may impact the system.

The recommendations for an attorney performance evaluation system that follow take into account the cost of implementation (both personnel and fiscal concerns), the ease or difficulty of using the system, and the community and local needs that should be addressed by any evaluation system. Two models for evaluating attorneys' performance are recommended and listed in order of preference: a hybrid system and a combined survey and standards of practice system.

### **A. The Hybrid Model**

Regardless of the availability of resources (financial and personnel) in Maine, the best system for evaluating attorney performance is a hybrid model that can be implemented across a geographically diverse state, allows for local modification, and simultaneously incorporates a review of the state's indigent legal services system. A system-wide review is important because an attorney's inadequate performance can be indicative of a failure of the entire representation system, especially if the performance results are consistent throughout the state rather than a localized problem.

The envisioned hybrid system combines aspects of Colorado, Massachusetts, Oregon, San Mateo County (CA), Vermont, and Virginia's performance evaluation systems, to provide a

comprehensive, adaptable, and efficient method of conducting reviews of private assigned counsels' performance throughout Maine. The system should be based on annual reviews of the performance of each assigned attorney, but that time frame could be shortened to periodic six-month reviews if the system is found to be an effective method of conducting attorney performance evaluations.

The implementation process should, first, strengthen the Commission's current Standards of Practice, for juvenile, criminal, and child protective cases, and expand those to include standards for mental health/involuntary (civil) commitment cases and appeals. *See Virginia*. These standards should be built into attorneys' contracts/appointment agreements and renewal applications, requiring every attorney to sign a form indicating that the attorney has reviewed the relevant standards. While I acknowledge the practical inefficiency in requiring each attorney to review all of the adopted Standards, establishing a process that ensures all private assigned counsel are made aware of and provided access to these resources creates an additional system-wide safeguard that all assigned counsel receive consistent guidance regarding the representation they provide.

A low-cost resource that would provide further systemic accountability in Maine is the implementation of a formalized Mentoring Protocol for newly rostered attorneys. Ideally, this procedure would pair an experienced rostered attorney with a newly rostered attorney practicing in the same locale. This procedure will foster professional relationships within the local indigent legal services bar and provide newly rostered attorneys with an excellent practice resource, especially if a second-chair attorney is needed for more specialized cases. A formal mentoring program may also benefit solo practitioners by providing these attorneys with an additional resource. Another beneficial resource for all MCILS rostered attorneys would be establishing to

a Brief and Motion Bank that is routinely updated by MCILS. Colorado provides an excellent example of this type of document bank, which includes the most frequently used legal documents.

In addition to providing the additional resources described above, the Commission should establish a formalized complaint process. Massachusetts has implemented a review process for client complaints that can be submitted using an online form or a collect-call phone number. The collect-call line is monitored by administrative personnel who are provided with a form, drafted by the Public Counsel Division, that includes required information such as the client's name and docket number, attorney, and the alleged complaint information. I would suggest that MCILS establish a collect-call number and provide online and hard copy client complaint forms that are made available in all prisons and courthouses. This collect-call feature for client complaints would provide indigent defendants who are illiterate or imprisoned with enhanced ability to make complaints about alleged inadequacies in assigned attorney performance. For example, according to Massachusetts, the most commonly made client complaint is an attorney's failure to properly meet with and inform their imprisoned client of their pending matter. Once Massachusetts receives this complaint, they check with prison records to see how frequently the client's attorney signed in and out of the prison and who the attorney was meeting. The client complaint process will also establish a heightened level of accountability and oversight for taxpayers by providing an opportunity for active participation by affected community members.

In addition to these initial recommendations, establishing a Survey system for criminal justice organizations that frequently interact with private assigned counsel, rather than only providing questions to the judiciary (*see Vermont*), will provide MCILS with anonymous feedback on attorney performance as well as system-wide performance information. I suggest

conducting the surveys using a survey platform that provides ease of access, graphics, cross-tabulating data, and options to sync with other data software. *See Oregon*; *see also* Appendices II-V. Ideally, survey participants should include District Attorneys, Judicial Officers, MCILS Executive and Deputy Directors, participating mentors and supervisors, assigned counsel for self-evaluations, investigators, interpreters, *guardian ad litem*s, and Department of Health and Human Services (DHHS) social workers. Soliciting input from other criminal justice participants beyond the judiciary minimizes the “system independence” concern raised by Vermont’s system and addressed by *Principle 1* of the ABA’s *Ten Principles* is minimized. *See* Appendix I.

My next recommendation for a hybrid system of performance evaluations would be to establish Supervising Attorneys (SA) or Compliance Officers positions in every county. My suggestion is to model the position’s structure after Massachusetts, combined with Oregon’s job description and responsibilities. As such, Supervising Attorneys would be attorneys currently rostered for serious violent felonies cases and appeals and contracted for supervision in their current county of practice, with multiple positions established in more populated districts.

To establish the Supervising Attorney position in Maine as one of “honor,” similar to Massachusetts’ model, the application process and standards for contract renewal should be set very high. Furthermore, in order to qualify as an SA, I suggest that no Supervising Attorney have a criminal charge in any jurisdiction that was not an outright dismissal or acquittal nor had any disciplinary complaint filed by the Maine Board of Overseers within the last two years.

Requiring high standards for this position ensures that MCILS will receive applicants who are highly qualified and well-respected within their local communities with a dedication to providing and improving indigent legal services. Finally, the Executive Director of MCILS or a quorum of

Commissioners should make the final decision approving or denying an attorney's application for the Supervising Attorney position.

I also recommend creating a contract-based system for the Supervising Attorney position at an initial \$70.00 per hour for a maximum of ten hours per week, with contracts renewable for one-year terms. *See Massachusetts*. According to Ms. Bennett (Massachusetts), establishing this position as a one year contract with a set workload increased the likelihood of attracting highly qualified attorneys, especially given that applicants are rostered attorneys currently accepting cases. Maine's Supervising Attorneys would provide direct monitoring, oversight, and evaluation of rostered attorneys in their county. *See Massachusetts and Oregon*. Furthermore, requiring the SAs to conduct in-person trial observations (*see* Appendices VIII- X), random brief and motion reviews (*see San Mateo*), and act as the initial investigator for client complaints (*see Massachusetts*) is likely to increase community awareness of MCILS' dedication to monitoring attorneys' performance.

My final recommendation for the hybrid system would be to establish a preliminary Data Collection system to track case types. It is my understanding that the Judiciary in Maine is currently in the process of redesigning or updating their software system. If the software upgrade occurs, I would strongly recommend working with the Judicial Branch to coordinate a cloud-based system that would provide MCILS with monthly "data dumps" from the courts (one-way only) to MCILS designated servers for data review and synthesis. This is very similar to how Oregon developed and implemented their data collection program and seems to be working well with minimal additional staff (two persons: one data researcher and one I.T. specialist). Since MCILS already uses DefenderData, which provides rich information about assigned cases, Meg Ledyard (Travis County) suggested that MCILS use existing resources to establish a test data

collection system. According to Andy Davies (NY), it is important to collect data from multiple sources to ensure that MCILS receives a variety of information from different perspectives and resources. If access to data is difficult (e.g. getting data “dumps” from the court system every month), Mr. Davies suggests including questions on submitted vouchers that attorneys are required to answer to get their voucher request approved. Furthermore, it is very likely that Maine will need to invest in servers and data software (either an SPSS or SQL) to ensure that the collection program runs efficiently as the collection process grows and develops.<sup>19</sup>

As previously stated, North Carolina (NCSEP) and the NLADA have developed online toolkits to help jurisdictions develop efficient and successful data collection systems. According to North Carolina and Travis County (TX), a jurisdiction seeking to implement a data collection program will need to organize a commission (“Values Commission”) or panel of individuals from the local criminal justice community to determine local values that would inform MCILS’ development of Key Performance Indicators (KPIs). The values commission should be comprised of at least local criminal defense bar members, judges and justices, prosecutors, non-profit organizations, etc., in order to obtain broad and rich value sets that the community has identified regarding indigent criminal defense representation. The KPIs would be distilled into quantifiable data points that MCILS could track for the purposes of attorney performance evaluation, monitoring the effectiveness and availability of pretrial services, and providing feedback on the indigent legal services system as a whole. Andy Davies’ (New York) initial suggestion is to focus on local, county-specific case type data for preliminary attorney

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<sup>19</sup> The cost for purchasing, not running, SPSS or SQL starts around \$10,000. However, we will likely need at least two additional personnel, one well versed in statistics and economics, and an IT person to conduct initial data collection and synthesis into the KPIs and specified objectives.

performance metrics and then expand to other areas, such as pretrial access, once the data collection system is fully operational.

One benefit that a data collection system can provide is safeguarding against implicit biases, especially race-based biases, that often occur within the criminal justice system. For instance, in the United States, our society has developed commonplace negative stereotypes regarding the association between “blackness” and crime, resulting in a “general tendency to categorize the group [blacks] with anything negative because of the overall negativity of the associations.” Yale Law Journal, *Implicit Racial Bias in Public Defender Triage*, L. Song Richardson and Phillip Atiba Goff, 122 Yale L.J. 2626, 2630 (2013).

Data collection for case types, attorney performance, and pretrial services can be particularly informative for determining how implicit bias affects Maine’s criminal justice system, specifically what the effect of implicit racial bias by criminal justice actors’ (e.g. defense attorneys, prosecutors, and judges) has on the quality and effectiveness of indigent criminal defendants.<sup>20</sup> Establishing attorney performance evaluations can prevent rushed decision-making by assigned counsel, thereby decreasing implicit attitudes towards marginalized minority groups by encouraging a more comprehensive initial case review process. While Maine’s system of private assigned counsel is likely to demonstrate less implicit bias than an overworked, understaffed public defender office in a densely populated jurisdiction, I suggest that a data collection system will provide Maine with a non-biased evaluation method that will help reduce

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<sup>20</sup> “Moreover, *without data collection*, it is *simply impossible to know* whether similarly situated clients are being treated alike.” L. Song Richardson and Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 Yale L.J. 2626, 2648-49 (2013) (emphasis added).

the discretionary impact implicit biases have on Maine’s system of indigent criminal defense representation.<sup>21</sup>

The implementation of a data collection system in Maine can also benefit indigent clients with respect to the assessment and availability of pretrial services. For instance, research conducted, in part, by NCSEP (including Travis County and other states) and the Laura and John Arnold Foundation<sup>22</sup> with Dr. Marie VanNostrand (Luminosity) has produced meaningful data analysis on the effect of available, effective pretrial systems. The result of this nationwide pretrial data has led to the creation of a pretrial risk-assessment tool “designed to assist judges in making release/detention determinations.”<sup>23</sup> Some of the data collected identified the impact pretrial resources has on, for instance, the rate of recidivism, a jurisdiction’s ability to predict new criminal activity, the likelihood of an increased sentence if no pretrial services are offered, and the overall efficiency of a pretrial system.<sup>24</sup> Therefore, MCILS would benefit from the implementation of a data collections system by providing objective evaluations of assigned counsels’ performance as well as monitoring the availability and effectiveness of pretrial services.

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<sup>21</sup> L. Song Richardson and Phillip Atiba Goff, in their article titled “Implicit Racial Bias in Public Defender Triage,” suggest five recommendations that could safeguard against effects implicit racial bias has on indigent criminal defense representation: (1) the change in office culture to increase recruitment of minorities and reduce negative stereotypes, (2) develop objective standards for case triage, (3) accountability for attorneys’ decisions, (4) awareness of an individuals’ unconscious bias through Implicit Association Tests (IAT), and (5) creating intentional goals to reduce affirmation of negative stereotypes. *Id.* at 2641-48 (2013).

<sup>22</sup> <http://www.arnoldfoundation.org/initiatives/case-studies/performing-foundational-research/>

<sup>23</sup> The Arnold Foundation developed the “Public Safety Assessment (PSA)” to provide criminal justice actors with an “evidence-based risk-assessment instrument.” The PSA was “created using a database of over 1.5 million cases drawn from more than 300 U.S. jurisdictions, analyzing collected data to predict factors such as how likely a defendant will commit a new crime and/or a new violent crime or fail to return to court.” The PSA does not take into account potential “discriminatory factors” such as race or education and, therefore, provides an objective standard. The PSA is currently in use in twenty-nine jurisdictions including three entire states—Arizona, Kentucky, and New Jersey. *Developing a National Model for Pretrial Risk Assessment* by the Laura and John Arnold Foundation (LJAF), [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary\\_PSA-Court\\_4\\_1.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-research-summary_PSA-Court_4_1.pdf).

<sup>24</sup> <http://luminosity-solutions.com/solutions/pretrial-research/>

## B. The Survey & Standards of Practice Model

While the above recommended hybrid system would provide Maine with the most comprehensive form of attorney performance evaluation, I have also developed a practical, low cost attorney performance evaluation model on the basis of Vermont's survey system and Virginia's Standards of Practice. This model would use an online survey platform, as discussed above, to conduct evaluations of private assigned counsel. The surveys should be sent to members of the local criminal justice community that consistently interact with MCILS rostered attorneys including, but not limited to, judges and justices, prosecutors, non-profits, MACDL, immigration counsel and advisors, investigators, psychologists and members of the Maine State Forensic Service, DHHS liaisons, and *guardian ad litem*.<sup>25</sup> These surveys should be conducted every six months and can be sent out in monthly batches. I would also strongly suggest conducting annual rostered attorney self-evaluations, including a brief or motion submission to be reviewed by MCILS with the annual attorney renewal application.

Regarding standards of practice, I find that Virginia's Standards provide the most comprehensive Standards, including a breadth of resources and knowledge that is incredibly informative and helpful for newly rostered attorneys and attorneys taking on new case types. My recommendation is to further develop Maine's enacted Standards of Practice for criminal, juvenile, and child protective cases, and adopt new, robust Standards of Practice for civil commitments, serious violent felonies, and appellate cases.<sup>26</sup> Furthermore, I would require all rostered attorneys to review and acknowledge receipt of these Standards, which can be made

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<sup>25</sup> Drafts of sample survey questions can be found in Appendices I-IV based on samples graciously provided by Vermont's Mary Deaett.

<sup>26</sup> See Chapter 101 (Juvenile Practice Standards), Chapter 102 (Criminal Practice Standards), and Chapter 103 (Child Protective Practice Standards).

available on the MCILS website, in order to ensure a consistent preliminary standard for representation regardless of a rostered attorney's experience level.

The adoption of this recommended model of combined surveys and Standards of Practice is not likely to require additional personnel and significant financial costs. However, this recommendation is a *narrow approach* and is likely to produce a facial analysis rather than an in-depth review of attorney performance. The advantage to this model is that the surveys and Standards of Practice could be implemented relatively quickly with minimal costs.

### **C. Conclusion**

While no constitutionally mandated right is absolute, safeguarding the right to counsel under the Sixth Amendment requires persistent attention and vigilance. In Maine, the current system of private assigned counsel meets many of the ABA's *Ten Principles of a Public Defense Delivery System* (see Appendix I), including maintaining an independent defense system, active participation by the Bar, early attachment of counsel, controlled attorney workload and continuous representation by the same attorney throughout all stages of a case. However, MCILS does not provide for substantial and significant attorney supervision and evaluation.

Additionally, no existing system of indigent defense representation is a perfect model for every jurisdiction. Yet, every state must provide a method of review for indigent legal services systems and evaluations of qualified attorneys providing indigent legal services. At the very least, an evaluation system must ensure a jurisdiction provides qualified and dedicated attorneys for indigent clients regardless of how the jurisdiction decides to structure the review process. Therefore, my recommendation for Maine is to implement a hybrid system of comprehensive attorney performance evaluations, including surveys, robust Standards of Practice, in-person

court observations, attorney self-evaluations, Supervising Attorney positions in every county, brief and motion review, client complaints, document banks, and data collection. In so doing, MCILS will provide more oversight, transparency, and accountability to taxpayers and the community while increasing structural safeguards for indigent clients. Most importantly, Maine will have a procedure to ensure that indigent clients throughout Maine receive *high quality legal representation* as well as providing rostered attorneys with the resources necessary to allow them to become better advocates for their clients.<sup>27</sup>

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<sup>27</sup> I would like to express my gratitude to everyone I have communicated with regarding this research for their advice, input, and suggestions (in alphabetical order): the San Mateo Bar Association, Marea Beeman, Nancy Bennett, Avis Buchanan, Nancy Cozine, Jae Davenport, Andy Davies, Mary Deaett, Lindy Frolich, Margaret Gressens, Randy Hawkes, Lee Hood, Meg Ledyard, Jon Mosher, Richard Pittman, and John Potter.

## APPENDIX I

### *ABA Black Letter Ten Principles of a Public Defense Delivery System*

**1** The public defense function, including the selection, funding, and payment of defense counsel, is independent.

**2** Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.

**3** Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel.

**4** Defense counsel is provided sufficient time and a confidential space within which to meet with the client.

**5** Defense counsel's workload is controlled to permit the rendering of quality representation.

**6** Defense counsel's ability, training, and experience match the complexity of the case.

**7** The same attorney continuously represents the client until completion of the case.

**8** There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.

**9** Defense counsel is provided with and required to attend continuing legal education.

**10** Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

## APPENDIX II

### Draft of Sample Rating Scale for Online Survey

1. **No Information**
2. **Unsatisfactory-** attorney has not demonstrated an adequate level of expected or required competence.
3. **Needs Significant Improvement-** attorney has some skill but has not demonstrated consistent expected or required competence.
4. **Satisfactory-** attorney has demonstrated proficiency, but still needs experience and further training to demonstrate consistent, competent performance.
5. **Good-** attorney has demonstrated consistent, competence performance.
6. **Very Good-** attorney has demonstrated consistent, high quality performance.
7. **Exceptional-** attorney has demonstrated consistent, superior performance.
8. **No Answer**

**Comment Section:** Please elaborate rating in areas where you find the attorney needs the most improvement and/or where the attorney has excelled exceptionally in and/or out of the courtroom.

**Note:** All conducted evaluations are submitted to the Commission anonymously to preserve the identity of the evaluating individual. The one exception is attorney self-evaluations.

**\*\*Modeled after Vermont's *LimeSurvey* Rating Scale**

**APPENDIX III**

**ATTORNEY SELF-EVALUATION**

Attorney Name: \_\_\_\_\_

Date: \_\_\_\_\_

| <b>KNOWLEDGE OF THE LAW</b>  | <b>Very Good</b> | <b>Satisfactory</b> | <b>Needs to Improve</b> | <b>Unsatisfactory</b> | <b>N/A</b> |
|--|------------------|---------------------|-------------------------|-----------------------|------------|
| 1. Demonstrates knowledge of the Rules of Criminal Procedure.  |                  |                     |                         |                       |            |
| 2. Demonstrates knowledge of the Rules of Evidence   |                  |                     |                         |                       |            |
| 3. Demonstrates knowledge of Family law.   |                  |                     |                         |                       |            |
| 4. Demonstrates knowledge of search and seizure law.   |                  |                     |                         |                       |            |
| 5. Appropriately files motions to suppress results of searches/seizures.   |                  |                     |                         |                       |            |
| 6. Demonstrates knowledge of confession law.   |                  |                     |                         |                       |            |
| 7. Appropriately files motions to suppress confessions.  |                  |                     |                         |                       |            |
| 8. Demonstrates knowledge of OUI law.  |                  |                     |                         |                       |            |
| 9. Demonstrates knowledge of substantive criminal law issues.  |                  |                     |                         |                       |            |
| 10. Appropriately prepared for hearing.  |                  |                     |                         |                       |            |
| 11. Appropriately addressed any potential immigration concerns.  |                  |                     |                         |                       |            |
| 12. Please indicate any upcoming or interested CLE courses.  |                  |                     |                         |                       |            |
| <b>COMMENTS: **Please include areas where you need the most improvement and how you plan to improve your skills.</b> |                  |                     |                         |                       |            |

| <b>MOTION PRACTICE/BRIEF WRITING</b>   | Very Good | Satisfactory | Needs to Improve | Unsatisfactory | N/A |
|--|-----------|--------------|------------------|----------------|-----|
| 1. Written product is submitted in a timely manner.  |           |              |                  |                |     |
| 2. Written product effectively and concisely conveys theory of defense.  |           |              |                  |                |     |
| 3. Written product is free of error and unnecessary language.  |           |              |                  |                |     |
| 4. Written product is correctly submitted according to the Rules of Criminal Procedure.                              |           |              |                  |                |     |
| 5. Written product effectively and concisely conveys legal theory.   |           |              |                  |                |     |
| <b>COMMENTS: **Please include areas where you need the most improvement and how you plan to improve your skills.</b> |           |              |                  |                |     |

| <b>COURTROOM SKILL</b>   | Very Good | Satisfactory | Needs to Improve | Unsatisfactory | N/A |
|--|-----------|--------------|------------------|----------------|-----|
| 1. Effectively presents the theory of defense.   |           |              |                  |                |     |
| 2. Effectively preforms voir dire.   |           |              |                  |                |     |
| 3. Persuasive opening and closing arguments.   |           |              |                  |                |     |
| 4. Demonstrates ability to effectively cross-examine state's witnesses.  |           |              |                  |                |     |
| 5. Demonstrates ability to effectively conduct direct examination of defense witnesses.                              |           |              |                  |                |     |
| 6. Demonstrates ability to think and respond quickly.  |           |              |                  |                |     |
| 7. Raises appropriate objections.  |           |              |                  |                |     |
| <b>COMMENTS: **Please include areas where you need the most improvement and how you plan to improve your skills.</b> |           |              |                  |                |     |

| <b>PLEA<br/>BARGAINING/SENTENCING</b>  | Very<br>Good | Satisfactory | Needs to<br>Improve | Unsatisfactory | N/A |
|--|--------------|--------------|---------------------|----------------|-----|
| 1. Negotiates best dispositions on behalf of client.   |              |              |                     |                |     |
| 2. Well-prepared on the facts for sentencing.  |              |              |                     |                |     |
| 3. Introduces evidence effectively at sentencing.  |              |              |                     |                |     |
| 4. Makes effective arguments at sentencing.  |              |              |                     |                |     |
| 5. Ensures client understands ramifications of sentence.   |              |              |                     |                |     |
| 6. Effectively conveys to the court extenuating circumstances surrounding client's case at sentencing.               |              |              |                     |                |     |
| <b>COMMENTS: **Please include areas where you need the most improvement and how you plan to improve your skills.</b> |              |              |                     |                |     |

| <b>PROFESSIONALISM</b>   | Very<br>Good | Satisfactory | Needs to<br>Improve | Unsatisfactory | N/A |
|--|--------------|--------------|---------------------|----------------|-----|
| 1. Advocates zealously for client.   |              |              |                     |                |     |
| 2. Treats opposing counsel and court with respect and dignity.   |              |              |                     |                |     |
| 3. Treats client with respect, compassion, and dignity.  |              |              |                     |                |     |
| 4. Demonstrates professional demeanor.   |              |              |                     |                |     |
| 5. Well-prepared for courtroom appearances.  |              |              |                     |                |     |
| 6. Demonstrates paramount concern for the legal rights of her/his client.  |              |              |                     |                |     |
| <b>COMMENTS: **Please include areas where you need the most improvement and how you plan to improve your skills.</b> |              |              |                     |                |     |

| <b>CLIENT RELATIONSHIP</b>   | Very Good | Satisfactory | Needs to Improve | Unsatisfactory | N/A |
|--|-----------|--------------|------------------|----------------|-----|
| 1. Attorney is responsive to client needs and regularly informs clients about her/his case.  |           |              |                  |                |     |
| 2. Ensures client understands her/his case, available options, and any offers from the State.  |           |              |                  |                |     |
| 3. Attorney's ability to consider and identify interpersonal problems facing clients, such as learning disabilities, substance abuse issues, and psychiatric needs, and how those problems may affect cases. |           |              |                  |                |     |
| <b>COMMENTS: **Please include areas where you need the most improvement and how you plan to improve your skills.</b>   |           |              |                  |                |     |

**APPENDIX IV**

**ATTORNEY EVALUATION—DISTRICT COURT**

**Attorney Name:** \_\_\_\_\_

**Date:** \_\_\_\_\_

| <b>KNOWLEDGE OF THE LAW</b>  | <b>Very Good</b> | <b>Satisfactory</b> | <b>Needs to Improve</b> | <b>Unsatisfactory</b> | <b>N/A</b> |
|--|------------------|---------------------|-------------------------|-----------------------|------------|
| 1. Demonstrates knowledge of the Rules of Criminal Procedure.            |                  |                     |                         |                       |            |
| 2. Demonstrates knowledge of the Rules of Evidence                       |                  |                     |                         |                       |            |
| 3. Demonstrates knowledge of search and seizure law.                     |                  |                     |                         |                       |            |
| 4. Appropriately files motions to suppress results of searches/seizures. |                  |                     |                         |                       |            |
| 5. Demonstrates knowledge of confession law.                             |                  |                     |                         |                       |            |
| 6. Appropriately files motions to suppress confessions.                  |                  |                     |                         |                       |            |
| 7. Demonstrates knowledge of OUI law.                                    |                  |                     |                         |                       |            |
| 8. Demonstrates knowledge of substantive criminal law issues.            |                  |                     |                         |                       |            |
| 9. Appropriately prepared for hearing.                                   |                  |                     |                         |                       |            |
| 10. Appropriately addressed potential immigration concerns.              |                  |                     |                         |                       |            |
| <b>COMMENTS:</b>   |                  |                     |                         |                       |            |
|  |                  |                     |                         |                       |            |

| <b>COURTROOM SKILL</b>  | <b>Very Good</b> | <b>Satisfactory</b> | <b>Needs to Improve</b> | <b>Unsatisfactory</b> | <b>N/A</b> |
|---|------------------|---------------------|-------------------------|-----------------------|------------|
| 1. Effectively presents the theory of defense.  |                  |                     |                         |                       |            |
| 2. Effectively performs voir dire.  |                  |                     |                         |                       |            |
| 3. Persuasive opening and closing arguments.  |                  |                     |                         |                       |            |
| 4. Demonstrates ability to effectively cross-examine state's witnesses.                 |                  |                     |                         |                       |            |
| 5. Demonstrates ability to effectively conduct direct examination of defense witnesses. |                  |                     |                         |                       |            |
| 6. Demonstrates ability to think and respond quickly.                                   |                  |                     |                         |                       |            |
| 7. Raises appropriate objections.   |                  |                     |                         |                       |            |
| <b>COMMENTS:</b>  |                  |                     |                         |                       |            |

| <b>MOTION PRACTICE/BRIEF WRITING</b>  | <b>Very Good</b> | <b>Satisfactory</b> | <b>Needs to Improve</b> | <b>Unsatisfactory</b> | <b>N/A</b> |
|---|------------------|---------------------|-------------------------|-----------------------|------------|
| 1. Written product is submitted in a timely manner.                                     |                  |                     |                         |                       |            |
| 2. Written product effectively and concisely conveys theory of defense.                 |                  |                     |                         |                       |            |
| 3. Written product is free of error and unnecessary language.                           |                  |                     |                         |                       |            |
| 4. Written product is correctly submitted according to the Rules of Criminal Procedure. |                  |                     |                         |                       |            |
| 5. Written product effectively and concisely conveys legal theory.                      |                  |                     |                         |                       |            |
| <b>COMMENTS:</b>  |                  |                     |                         |                       |            |

| <b>PLEA BARGAINING/SENTENCING</b>  | Very Good | Satisfactory | Needs to Improve | Unsatisfactory | N/A |
|--|-----------|--------------|------------------|----------------|-----|
| 1. Negotiates best dispositions on behalf of client.   |           |              |                  |                |     |
| 2. Well-prepared on the facts for sentencing.  |           |              |                  |                |     |
| 3. Introduces evidence effectively at sentencing.  |           |              |                  |                |     |
| 4. Makes effective arguments at sentencing.  |           |              |                  |                |     |
| 5. Ensures client understands ramifications of sentence.   |           |              |                  |                |     |
| 6. Effectively conveys to the court extenuating circumstances surrounding client's case at sentencing. |           |              |                  |                |     |
| <b>COMMENTS:</b>   |           |              |                  |                |     |

| <b>PROFESSIONALISM</b>  | Very Good | Satisfactory | Needs to Improve | Unsatisfactory | N/A |
|---|-----------|--------------|------------------|----------------|-----|
| 1. Advocates zealously for client.  |           |              |                  |                |     |
| 2. Treats opposing counsel and court with respect and dignity.            |           |              |                  |                |     |
| 3. Treats client with respect, compassion, and dignity.                   |           |              |                  |                |     |
| 4. Demonstrates professional demeanor.                                    |           |              |                  |                |     |
| 5. Well-prepared for courtroom appearances.                               |           |              |                  |                |     |
| 6. Demonstrates paramount concern for the legal rights of her/his client. |           |              |                  |                |     |
| <b>COMMENTS:</b>  |           |              |                  |                |     |

| <b>CLIENT RELATIONSHIP</b>   | <b>Very Good</b> | <b>Satisfactory</b> | <b>Needs to Improve</b> | <b>Unsatisfactory</b> | <b>N/A</b> |
|--|------------------|---------------------|-------------------------|-----------------------|------------|
| 1. Attorney is responsive to client needs and regularly informs clients about her/his case.  |                  |                     |                         |                       |            |
| 2. Ensures client understands her/his case, available options, and any offers from the State.  |                  |                     |                         |                       |            |
| 3. Attorney's ability to consider and identify interpersonal problems facing clients, such as learning disabilities, substance abuse issues, and psychiatric needs, and how those problems may affect cases. |                  |                     |                         |                       |            |
| <b>COMMENTS:</b>   |                  |                     |                         |                       |            |

**APPENDIX V**

**ATTORNEY EVALUATION—FAMILY COURT (JV, CP, EM)**

**Attorney Name:** \_\_\_\_\_

**Date:** \_\_\_\_\_

| <b>KNOWLEDGE OF THE LAW</b>                         | <b>Very Good</b> | <b>Satisfactory</b> | <b>Needs to Improve</b> | <b>Unsatisfactory</b> | <b>N/A</b> |
|---|------------------|---------------------|-------------------------|-----------------------|------------|
| 1. Demonstrates knowledge of Family law.            |                  |                     |                         |                       |            |
| 2. Demonstrates knowledge of the Rules of Evidence. |                  |                     |                         |                       |            |
| 3. Raises appropriate objections.                   |                  |                     |                         |                       |            |
| <b>COMMENTS:</b>                                    |                  |                     |                         |                       |            |

| <b>COURTROOM SKILL</b>  | <b>Very Good</b> | <b>Satisfactory</b> | <b>Needs to Improve</b> | <b>Unsatisfactory</b> | <b>N/A</b> |
|---|------------------|---------------------|-------------------------|-----------------------|------------|
| 1. Effectively presents the theory of defense.  |                  |                     |                         |                       |            |
| 2. Effectively preforms voir dire.  |                  |                     |                         |                       |            |
| 3. Persuasive opening and closing arguments.  |                  |                     |                         |                       |            |
| 4. Demonstrates ability to effectively cross-examine state's witnesses.                 |                  |                     |                         |                       |            |
| 5. Demonstrates ability to effectively conduct direct examination of defense witnesses. |                  |                     |                         |                       |            |
| 6. Demonstrates ability to think and respond quickly.                                   |                  |                     |                         |                       |            |
| 7. Is familiar with facts of the case.  |                  |                     |                         |                       |            |
| 8. Effectively represents her/his client.   |                  |                     |                         |                       |            |
| 9. Appropriately prepared for hearing.  |                  |                     |                         |                       |            |
| 10. Effectively introduces relevant evidence at hearing.                                |                  |                     |                         |                       |            |
| <b>COMMENTS:</b>  |                  |                     |                         |                       |            |

| <b>EFFECTIVE REPRESENTATION</b>   | Very Good | Satisfactory | Needs to Improve | Unsatisfactory | N/A |
|---|-----------|--------------|------------------|----------------|-----|
| 1. Negotiates best outcome for client.  |           |              |                  |                |     |
| 2. If representing a child, is sensitive to the developmental and emotional needs of the child. |           |              |                  |                |     |
| 3. Understands the causes and effects of child abuse.   |           |              |                  |                |     |
| 4. Understands the family dynamics in each case.  |           |              |                  |                |     |
| 5. Demonstrates awareness of dispositional alternatives.  |           |              |                  |                |     |
| <b>COMMENTS:</b>  |           |              |                  |                |     |

| <b>PROFESSIONALISM</b>  | Very Good | Satisfactory | Needs to Improve | Unsatisfactory | N/A |
|---|-----------|--------------|------------------|----------------|-----|
| 1. Advocates zealously for client.  |           |              |                  |                |     |
| 2. Treats opposing counsel and court with respect and dignity.            |           |              |                  |                |     |
| 3. Treats client with respect, compassion, and dignity.                   |           |              |                  |                |     |
| 4. Demonstrates professional demeanor.                                    |           |              |                  |                |     |
| 5. Well-prepared for courtroom appearances.                               |           |              |                  |                |     |
| 6. Demonstrates paramount concern for the legal rights of her/his client. |           |              |                  |                |     |
| <b>COMMENTS:</b>  |           |              |                  |                |     |

| <b>CLIENT RELATIONSHIP</b>  | <b>Very Good</b> | <b>Satisfactory</b> | <b>Needs to Improve</b> | <b>Unsatisfactory</b> | <b>N/A</b> |
|---|------------------|---------------------|-------------------------|-----------------------|------------|
| 1. Attorney is responsive to client needs and regularly informs clients about her/his case.   |                  |                     |                         |                       |            |
| 2. Ensures client understands her/his case, available options, and any offers from the State.   |                  |                     |                         |                       |            |
| 3. Ability to consider and identify interpersonal problems facing clients, such as learning disabilities, substance abuse issues, and psychiatric needs, and how they may affect cases. |                  |                     |                         |                       |            |
| <b>COMMENTS:</b>  |                  |                     |                         |                       |            |

## APPENDIX VI

**\*\*Note, this is a working document provided by Andy Davies at New York Indigent Legal Services**

For each case, indicate:

- 1) Investigation/Legal research
  - Did any member of the defense team visit the crime scene? (Y/N)
  - Were any potential witnesses interviewed by a member of the defense team? (Y/N)
  - What was the total amount of time of all such interviews in minutes, combined? (Enter # minutes)
  - Did any member of the defense team request records (other than the client's rap sheet, or discovery materials)? (Y/N)
  - Did any member of the defense team testify in court to the findings of the defense investigation? (Y/N)
  - Did any member of the defense team conduct legal research (e.g. consult statutes or cases, practice manuals, treatises, or law review articles) in the course of the case? (Y/N)
- 2) Use of Experts/Interpreters
  - Was any person retained as an expert witness in the course of the case? (Y/N)
  - Did that person testify in the case? (Y/N)
  - Was English the client's first language? (Y/N)
  - Was an interpreter used in the case? (Y/N)
  - Was an interpreter retained by the defense to facilitate confidential client communications? (Y/N)
- 3) In-court work
  - Was a motion to dismiss filed at any time in the case? (Y/N)
  - Was a motion to suppress evidence filed at any time in the case? (Y/N)
- 4) Client contact and communication/Counsel at first appearance. Record date of arrest, first appearance, first client meeting, all subsequent meetings and court appearances, and time taken for those meetings. From these, system can calculate:
  - Time between first appearance and first client meeting (# hours & days, or 'zero' if counsel at first appearance is present.)
  - How many court appearances in the case (# appearances)
  - How many meetings with clients other than in court (# meetings, other than on court appearance days)
  - Total amount of time of all in-person client meetings combined? (# minutes/hours of meetings)

For each attorney, indicate, for the past year:

- 1) Qualifications and experience
  - # hours in program-relevant CLE training (Enter # hours per 2 year license renewal period)
  - # trials conducted. (Enter # trials, including trials where plea agreement was reached after proceedings had begun)
  - Year passed bar.
- 2) Hours worked on private & public cases

- Hours worked per week, on average, on cases as privately retained lawyer (**Enter # hours, entered quarterly**)
  - Hours worked per week, on average, on cases as public defender, conflict defender, legal aid attorney, or assigned counsel under county law 18-b (**Enter # hours, entered quarterly**)
- 3) Part-time or full-time status
- Is attorney part-time or full-time? (**PT/FT**)
  - How many hours per week does their contract require? (**Enter # hours**)
- 4) Responsibilities
- Hours per week spent supervising other attorneys (in context of publicly funded representation only). (**Enter # hours**)

**APPENDIX VII**

**DISTRICT COURT OBSERVATION**

**\*\*developed from Colorado's Trial Court Observation Form (see Appendix VIII)**

Observer & Date:

Attorney, Docket Number, & Judge's Name:

Hearing Type; Portion of Case Observed:

Client Interaction:

Level of Preparedness:

Knowledge of Record & Facts:

Knowledge of Relevant Law:

Comments on Objections, Evidence Handling, Persuasion:

General Observations:

Areas for Improvement:

APPENDIX VIII

Colorado ADC Appellate Court Observation Form; provided by Lindy Frolich

APPELLATE COURT OBSERVATION FORM

Defendant's attorney: \_\_\_\_\_ Date: \_\_\_\_\_

Defendant's name and case number: \_\_\_\_\_

Panel of Judges: \_\_\_\_\_

Opposing counsel: \_\_\_\_\_

Issue(s): \_\_\_\_\_

\_\_\_\_\_

Attire: \_\_\_\_\_

Mannerisms: \_\_\_\_\_

Papers/iPads/laptops: \_\_\_\_\_

Knowledge of Record/Facts: \_\_\_\_\_

\_\_\_\_\_

Knowledge of relevant law: \_\_\_\_\_

\_\_\_\_\_

General Impressions: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Areas for Improvement: \_\_\_\_\_

\_\_\_\_\_

Evaluator: \_\_\_\_\_

## APPENDIX IX

### San Mateo County Bar Association Evaluation Standards

#### EVALUATION STANDARDS

##### 1. PROFESSIONAL ABILITY

###### A. Preparation and Knowledge

1. Recognition of Legal Issues: The attorney recognizes the issues in the case that are necessary for the proper defense of the client. The attorney demonstrates creativity in resolving legal problems.
2. Judgment in Assessing Cases: The attorney demonstrates an ability to evaluate and assess a case taking into consideration the strengths and weaknesses of the prosecution and defense cases.
3. Effective Legal Research and Use of Pretrial Motions: The attorney has a satisfactory working knowledge of resource materials for use in all aspects of criminal practice. The attorney prepares well-written and researched motions that are timely filed in appropriate cases.
4. Effective Use of Investigation: The attorney recognizes those cases in which investigation is required. Requests are reasonable and appropriate and communicated in a clear and timely manner.
5. Effective Use of Experts: The attorney seeks assistance of experts in appropriate cases. Information is provided to the expert in a timely fashion, and the attorney prepares for presentation of expert testimony.
6. Witness Preparation: The attorney prepares witnesses and clients in such areas as courtroom procedures, direct and cross-examination, demeanor, and physical appearance.

###### B. Advocacy

1. Courtroom Demeanor: The attorney's demeanor is professional and conducive to effective representation.
2. Willingness to Try Cases: The attorney takes cases to trial when appropriate.
3. Advocacy Skills: A Private Defender is called upon to employ a variety of differing advocacy skills in representing clients in jury trials, court trials, juvenile hearings, preliminary hearings, and in other courtroom matters. For purposes of this category, the attorney should demonstrate effective advocacy skills including but not limited to such items as: voir dire; direct and cross-examination; introduction of, objection to, and admissibility of evidence; argument; instructions; and recognition of appellate issues.
4. Case Negotiations and Sentencing: The attorney enters into case negotiations conversant with the significant issues and ascertainable facts. The attorney recognizes plea alternatives and

consequences and properly advises the client. The attorney communicates effectively with the other parties involved in the case. The attorney makes thorough use of sentencing laws, seeking imaginative and creative sentencing alternatives.

## II. PROFESSIONAL ATTITUDE

### A. Professionalism

1. Ethics and Integrity: The attorney is aware of and observes the Rules of Professional Conduct and other ethical obligations of the defense bar and acts at all times with integrity.

2. Professional Growth: The attorney demonstrates an interest in his or her professional growth by a willingness to accept new and more challenging assignments and by seeking educational opportunities that will make him or her a more knowledgeable advocate. The attorney's attendance at Private Defender Program education programs and at continuing education programs sponsored by other defender organizations, such as CPDA and CACJ, should demonstrate his or her zeal for excellence as a trial lawyer.

### B. Work Habits

1. Volume and Calendar Management: The attorney satisfactorily handles the number of cases he or she accepts and manages his or her schedule to maximize personal effectiveness to the benefit of the client.

2. Court Appearances: The attorney appears in court punctually and keeps the court apprised of his or her whereabouts.

## III. PERSONAL RELATIONS

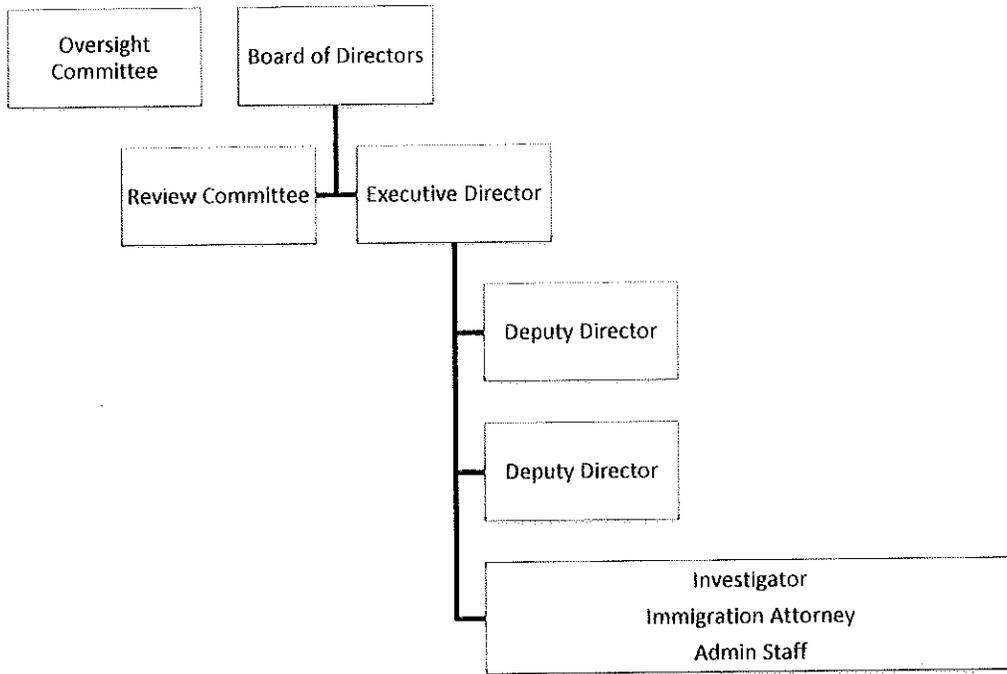
1. Clients: The attorney maintains contact with both in- and out-of-custody clients sufficient to provide competent representation for each court appearance. The attorney develops and maintains the client's trust and confidence. The attorney keeps the client advised as to the status of the case and explains constitutional and statutory rights. The attorney is sensitive to the special problems attendant to the representation of mentally ill clients, hostile clients, and resistant clients.

2. Private Defender Staff: The attorney's interaction with, clerical staff, investigators, and other staff demonstrates a spirit of cooperation, assistance and respect. The attorney is considerate of the pressures imposed upon all staff by high volume, time constraints and limited resources.

3. Members of the Justice System: The attorney is cognizant that the manner in which he or she interacts with judicial officers, prosecutors, courtroom personnel, law enforcement personnel, co-counsel, and other members of the justice system contributes to the effective representation of Private Defender clients.

APPENDIX X

TRAVIS COUNTY (TX)—“CAPDS” ORGANIZATION STRUCTURE



## APPENDIX XI

### Oregon Annual Public Defender Survey Questions

**\*\*working document provided by Nancy Cozine**

1. Please tell us your role in your county's justice system?
2. How long have you worked in your county's justice system?
3. Please tell us where you work (county/Court).
4. Are you able to comment on the quality of public defense representation in adult criminal cases?—survey will skip questions related to this topic
5. Please rate your overall impression of the quality of public defense representation in adult criminal cases.
6. Within the past year, has the quality of public defense representation changed in adult criminal cases?
7. Do public defense attorneys in your judicial district provide satisfactory representation of clients in adult criminal cases?
8. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in criminal cases?
9. How would you describe the adult criminal caseloads of public defense attorneys in your judicial district?
10. Are you able to comment on the quality of public defense representation in juvenile dependency cases? –survey will skip questions related to this topic
11. Please rate your overall impression of the quality of public defense representation in juvenile dependency cases.
12. Within the past year, has the quality of public defense representation changed in juvenile dependency cases?
13. Do public defense attorneys in your judicial district provide satisfactory representation of clients in juvenile dependency cases?
14. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in juvenile dependency cases?
15. How would you describe the juvenile dependency caseloads of public defense attorneys in your judicial district?
16. Are you able to comment on the quality of public defense representation in juvenile delinquency cases?—survey will skip questions related to this topic
17. Please rate your overall impression of the quality of public defense representation in juvenile delinquency cases.
18. Within the past year, has the quality of public defense representation changed in juvenile delinquency cases?
19. Do public defense attorneys in your judicial district provide satisfactory representation of clients in juvenile delinquency cases?
20. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in juvenile delinquency cases?
21. How would you describe the juvenile delinquency caseloads of public defense attorneys in your judicial district?

22. Are you able to comment on the quality of public defense representation in death penalty (serious violent felony) cases?—survey will skip questions related to this topic
23. Please provide any comments you have concerning the quality of public defense representation in death penalty cases.
24. Are you able to comment on the quality of public defense representation in civil commitment (involuntary commitment) cases?—survey will skip questions related to this topic
25. Please rate your overall impression of the quality of public defense representation in civil commitment cases.
26. Within the past year, has the quality of public defense representation changed in civil commitment cases?
27. Do public defense attorneys in your judicial district provide satisfactory representation of clients in civil commitment cases?
28. Do you question the competence of any public defense attorneys in your jurisdiction who provide representation in civil commitment cases?
29. How would you describe the civil commitment caseloads of public defense attorneys in your judicial district?
30. Please provide any comments, concerns, or suggestions that you may have about the quality of public defense representation in your county or judicial district.

**(4.)**  
**Contracts Discussion**

## CONTRACT FOR PUBLIC DEFENSE SERVICES

The [City, County, State], referred to as “the Contracting Authority,” and [law firm or non-profit organization], referred to hereafter as “the Agency,” agree to the provision of public defense services as outlined below for the period [date] to [date]. The Contracting Authority Administrator is [ ], and the Managing Director of the Agency is [ ].

Following are the underlying bases for the Contract:

- [City, County, State] has a constitutionally mandated responsibility to provide public defender services which is specifically defined in [local ordinance or statute], and/or a [statutory/judicially-required] duty to provide [specify juvenile, civil commitment, etc. services].
- The Contracting Authority desires to have legal services performed for eligible persons entitled to public representation in \_\_\_\_ [City, County, State] by the Agency, as authorized by law.
- The Agency agrees to provide, and the Contracting Authority agrees to pay for, competent, zealous representation to its clients as required by the controlling Professional Responsibility [Rules or Code].
- The Contracting Authority and the Agency agree that any and all funds provided pursuant to this Contract are provided for the sole purpose of provision of legal services to eligible clients of the Agency.

The parties agree as follows:

### I. DURATION OF CONTRACT

This Contract shall commence on \_\_\_\_\_ and terminate on \_\_\_\_\_, unless extended or terminated earlier in a manner allowed by this Contract.

### II. DEFINITIONS

The following definitions control the interpretation of this Contract:

- A. Eligible client means a defendant, parent, juvenile, or person who is facing civil commitment or any other person who has been determined by a finding by the Contracting Authority or Court to be entitled to a court-appointed attorney, pursuant to [relevant state statute, court rule, and constitutional provision].
- B. Case; Case Completion: A Case shall mean representation of one person on one charging document. In the event of multiple counts stemming from separate transactions, additional case credit will be recognized. Completion of a case is deemed to occur when all necessary legal action has been taken during the following period(s): In criminal cases, from arraignment through disposition, from arraignment through the necessary withdrawal of counsel after the substantial delivery of legal services, or from the entry of counsel into the case (where entry into the case occurs after arraignment through no fault of the Agency) through disposition or necessary withdrawal after the substantial delivery of legal services. Nothing in this definition prevents the Agency from providing necessary legal services to an eligible client prior to arraignment, but payment for such services will require a showing pursuant to the Extraordinary Expenses paragraph below. In other cases, [define according to type of case—juvenile, family, etc.].
- C. Disposition: Disposition in criminal cases shall mean: 1) the dismissal of charges, 2) the entering of an order of deferred prosecution, 3) an order or result requiring a new trial, 4) imposition of sentence, or 5) deferral of any of the above coupled with any other hearing on that cause number, including but not limited to felony or misdemeanor probation review, that occurs within thirty (30) days of sentence, deferral of sentence, or the entry of an order of deferred prosecution. No hearing that occurs after 30 days of any of the above will be considered part of case disposition for the purpose of this Contract except that a restitution hearing ordered at the time of original disposition, whether it is held within 30 days or subsequently, shall be included in case disposition. Disposition includes the filing of a notice of appeal, if applicable. Nothing in this definition prevents the Agency from providing necessary legal services to an eligible client after disposition, but payment for such services will require a showing pursuant to the Extraordinary Expenses paragraph below. Disposition in other cases shall mean: [define according to type of case—juvenile, family, etc.].
- D. Representational Services: The services for which the Contracting Authority is to pay the Agency are representational services, including lawyer services and appropriate support staff services, investigation and appropriate sentencing advocacy and social work services, and legal services including but not limited to interviews of clients and potential witnesses, legal research, preparation and filing of pleadings, negotiations with the appropriate prosecutor or other agency and court regarding possible dispositions, and preparation for and appearance at all court proceedings. The services for which the Contracting Authority is to pay the Agency do not include extraordinary expenses incurred in the representation of eligible clients. The allowance of extraordinary expenses at the cost of the Contracting Authority will be

determined by a court of competent jurisdiction in accordance with [relevant state statute, court rule, and constitutional provisions].

- E. Complex Litigation Cases: Complex Litigation refers to: 1) all Capital homicide cases, 2) all aggravated homicide cases, 3) those felony fraud cases in which the estimated attorney hours necessary exceeds one hundred seventy (170) hours, 4) cases which involve substantial scientific information resulting in motions to exclude evidence pursuant to controlling caselaw emanating from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and *Daubert v. Merrell Dow*, 113 S.Ct. 2786 (1993), or similar opinions, and 5) other cases in which counsel is able to show the appropriate court in an *ex parte* proceeding that proper representation requires designation of the case as complex litigation.
- F. Other Litigation Expenses: Other Litigation Expenses shall mean those expenses which are not part of the contract with the Agency, including expert witness services, language translators, laboratory analysis, and other forensic services. It is anticipated that payment for such expenses will be applied for in the appropriate courts by motion and granted out of separate funds reserved for that purpose. Payment for mitigation specialists in Capital cases is included in this category.
- G. Misappropriation of Funds: Misappropriation of funds is the appropriation of funds received pursuant to this Contract for purposes other than those sanctioned by this Contract. The term shall include the disbursement of funds for which prior approval is required but is not obtained.

### III. INDEPENDENT CONTRACTOR

The Agency is, for all purposes arising out of this Contract, an independent contractor, and neither the Agency nor its employees shall be deemed employees of the Contracting Authority. The Agency shall complete the requirements of this Contract according to the Agency's own means and methods of work, which shall be in the exclusive charge and control of the Agency and which shall not be subject to control or supervision by the Contracting Authority, except as specified herein.

### IV. POLICY BOARD

Oversight of the Agency in matters such as interpretation of indigent defense standards, recommendation of salary levels and reasonable caseloads, and response to community and client concerns, shall be provided by the Policy Board. The Policy Board shall be [appointed/designated] by the Contracting Authority and shall consist of [3-13] diverse members, a majority of which shall be practicing attorneys, and shall include representatives of organizations directly servicing the poor or concerned with the problems of the client community, provided that no single branch of government shall have a majority of votes, and the membership shall not include prosecutors, judges or law enforcement officials. The Agency will meet regularly with the Policy Board.

## V. AGENCY'S EMPLOYEES AND EQUIPMENT

The Agency agrees that it has secured or will secure at the Agency's own expense, all persons, employees, and equipment required to perform the services contemplated/required under this Contract.

## VI. MINIMUM QUALIFICATIONS FOR AGENCY ATTORNEYS

- A. Every Agency attorney shall satisfy the minimum requirements for practicing law in [state] as determined by the [state] Supreme Court. Seven hours of [each year's required or (where CLE is not otherwise required) yearly] continuing legal education credits shall be in spent in courses relating to criminal law practice or other areas of law in which the Agency provides legal services to eligible clients under the terms of this Contract. The Agency will maintain for inspection on its premises records of compliance with this provision.
- B. Each Agency attorney representing a defendant accused of a [\_\_\_\_\_] (e.g. Class A) felony, as defined in [relevant local statute], must have served at least two years as a prosecutor, a public defender, or assigned counsel within a formal assigned counsel plan that included training, or have demonstrably similar experience, and been trial counsel and handled a significant portion of the trial in 5 felony cases that have been submitted to a jury.
- C. Each staff attorney representing a juvenile respondent in a [\_\_\_\_\_] (e.g. Class A) felony, as defined in [relevant local statute], shall meet the qualifications of (B) above and demonstrate knowledge of the practices of the relevant juvenile court, or have served at least one year as a prosecutor, a public defender, or assigned counsel within a formal assigned counsel plan that included training, assigned to the prosecution or defense of accused persons in juvenile court, or have demonstrably similar experience, and handled at least 5 felony cases through fact finding and disposition in juvenile court.
- D. Each staff attorney representing a defendant accused of a [\_\_\_\_\_] (e.g. Class B or C) felony, as defined in [relevant local statute], or involved in a probation or parole revocation hearing, must have served at least one year as a prosecutor, a public defender, or assigned counsel within a formal assigned counsel plan that included training, or have demonstrably similar experience, and been sole trial counsel of record in five misdemeanor cases brought to final resolution, or been sole or co-trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury alone or of record with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury.
- E. Each attorney representing any other client assigned as a part of this Contract shall meet the requirements of (B) above or work directly under the supervision of a senior, supervising attorney employed by the Agency, who meets the requirements of (B)

above. Such direct supervision shall continue until the attorney has demonstrated the ability to handle cases on his/her own. Should the caseload under this Contract require 10 or more FTE attorneys, the Agency will provide one FTE supervising attorney for every 10 FTE caseload attorneys.

- E. Notwithstanding the above, each Capital case assigned to the Agency will be staffed by two full time attorneys or FTE attorneys. The lead attorney shall have at least seven years of criminal law experience and training or experience in the handling of Capital cases; associate counsel shall have at least five years of criminal law experience
- F. Notwithstanding the above, each Capital case assigned to the Agency will be staffed by two full time attorneys or FTE attorneys. The lead attorney shall have at least seven years of criminal law experience and training or experience in the handling of Capital cases; associate counsel shall have at least five years of criminal law experience
- G. Notwithstanding the above, each Complex Litigation case assigned to the Agency other than a Capital case shall be staffed by one FTE attorney with at least seven years of criminal law experience, or the equivalent of one half-time (.5 FTE) attorney with seven years of criminal law experience and one half-time (.5 FTE) attorney with five years of criminal law experience.
- H. Failure on the part of the Agency to use staff with the appropriate amount of experience or to supervise appropriately its attorneys shall be considered a material breach of this Contract. Failure on the part of the Contracting Authority to provide adequate funding to attract and retain experienced staff and supervisor(s) shall be considered a breach of this Contract.

## VII. PERFORMANCE REQUIREMENTS

The Agency agrees to provide the services and comply with the requirements of this Contract. The number of cases for which such services will be required is the amount specified on Worksheet A, subject to the variance terms specified in Section VII (Variance). Any material breaches of this agreement on the part of the Agency or the Contracting Authority may result in action as described in Section XVIII (Corrective Action) or Section XIX (Termination and Suspension).

The Agency agrees to provide representational services in the following types of cases: [ ]

The Agency agrees to staff its cases according to the following provisions:

- A. Continuity of representation at all stages of a case, sometimes referred to as "vertical" representation, promotes efficiency, thoroughness of representation, and positive attorney/client relations. The Agency agrees to make reasonable efforts to continue

the initial attorney assigned to a client throughout all cases assigned in this Contract. Nothing in this section shall prohibit the Agency from making necessary staff changes or staff rotations at reasonable intervals, or from assigning a single attorney to handle an aspect of legal proceedings for all clients where such method of assignment is in the best interest of the eligible clients affected by such method of assignment.

- C. The Agency agrees that an attorney will make contact with all other clients within 5 working days from notification of case assignment.
- D. Conflicts of interest may arise in numerous situations in the representation of indigent defendants. The Agency agrees to screen all cases for conflict upon assignment and throughout the discovery process, and to notify promptly the Contracting Authority when a conflict is discovered. The Agency will refer to the [state] Rules of Professional Conduct, as interpreted by [the (state or other relevant) Bar Association and /or] opinions of the state judiciary, and to the American Bar Association Standards for Criminal Justice in order to determine the existence and appropriate resolution of conflicts.
- E. It is agreed that the Agency will maintain average annual caseloads per full time attorney or full time equivalent (FTE) no greater than the following:

|                           |     |
|---------------------------|-----|
| Felony Cases              | 150 |
| Misdemeanor Cases         | 400 |
| Juvenile Offender Cases   | 200 |
| Juvenile Dependency Cases | 60  |
| Civil Commitment Cases    | 250 |
| Contempt of Court Cases   | 225 |
| Drug Court Cases          | 200 |
| [Appeals                  | 25] |

These numbers assume that the attorney is assigned only cases that fit into one category. If, instead, a FTE attorney spends half of her time on felony cases and half of her time on misdemeanor cases, she would be expected to carry an annual caseload no greater than 75 felonies and 150 misdemeanors. If the same attorney works less than full time or splits her time between Contract cases and private business, that attorney would be expected to carry a maximum caseload proportional to the portion of her professional time which she devotes to Contract cases. All attorneys who split their time between Contract work and private business as well as work under this contract must report the quantity of hours they devote to private business to the Contracting Authority so that Agency caseload levels may be accurately monitored.

It is assumed that the level of competent assistance of counsel contemplated by this Contract cannot be rendered by an attorney who carries an average annual caseload substantially above these levels. Failure on the part of the Agency to limit its

attorneys to these caseload levels is considered to be a material breach of this agreement.

Complex Litigation is considered to be outside of the normal caseload and is handled as described in Section VI. G. below.

- F. Adequate support staff is critical to an attorney's ability to render competent assistance of counsel at the caseload levels described above. The parties agree and expect that at a minimum the Agency will employ support staff services for its attorneys at a level proportionate to the following annual caseloads:

One full time Legal Assistant for every four FTE Contract attorneys  
One full time Social Service Caseworker for every 450 Felony Cases  
One full time Social Service Caseworker for every 600 Juvenile Cases  
One full time Social Service Caseworker for every 1200 Misdemeanor Cases  
One full time Investigator for every 450 Felony Cases  
One full time Investigator for every 600 Juvenile Cases  
One full time Investigator for every 1200 Misdemeanor Cases

In addition, attorneys must have access to mental health evaluation and recommendation services as required.

It is expected that support staff will be paid at a rate commensurate with their training, experience and responsibility, at levels comparable to the compensation paid to persons doing similar work in public agencies in the jurisdiction. The Agency may determine the means by which support staff is provided. The use of interns or volunteers is acceptable, as long as all necessary supervision and training is provided to insure that support services do not fall below prevailing standards for quality of such services in this jurisdiction.

- G. If the Agency is to be responsible for representing defendants in Complex Litigation cases, the following provisions apply. Complex Litigation cases occupy the full time or FTE of one attorney and the half time of one investigator prior to completion, except for Capital cases which typically require 2 FTE attorneys and the FTE of one investigator, as well as the services of a mitigation specialist. Aggravated homicide cases are considered Capital cases until such time as an irrevocable decision is made by the [Prosecuting Attorney/District Attorney] not to seek the death penalty in the case.

Complex Litigation cases remain pending until the termination of the guilt phase and penalty phase of the trial, or entry of a guilty plea. Upon entry of a verdict or guilty plea, such cases are complete for the purposes of accepting additional Complex Litigation cases. Payment for post-conviction, pre-judgment representation shall be negotiated.

Other special provisions of this Contract which relate to Complex Litigation are found in Section V (Minimum Qualifications) and Section VIII (Assignment of Complex Litigation).

- H. Sexual Predator Commitment Cases: "Sexual predator commitment" cases shall be handled as Complex Litigation cases.
- I. The Agency may use legal interns. If legal interns are used, they will be used in accordance with [citation to State Admission to Practice Rules].
- J. The Agency agrees that it will consult with experienced counsel as necessary and will provide appropriate supervision for all of its staff.

Significant Changes

Significant increases in work resulting from changes in court calendars, including the need to staff additional courtrooms, shall not be considered the Agency's responsibility within the terms of this Contract. Any requests by the courts for additional attorney services because of changes in calendars or work schedules will be negotiated separately by the agency and Contracting Authority and such additional services shall only be required when funding has been approved by the Contracting Authority, and payment arranged by contract modification.

**VIII. VARIANCE**

The Agency and the Contracting Authority agree that the actual number of cases assigned under this contract may vary from the numbers agreed on Worksheet A by the following levels:

|                      |     |
|----------------------|-----|
| Monthly Variance     | 20% |
| Quarterly Variance   | 15% |
| Semi-Annual Variance | 15% |
| Yearly Variance      | 5%  |

Any deviation in the number of cases assigned that is within the limits above shall not result in alteration of payment owed to the Agency by the Contracting Authority and shall not be the cause of renegotiation of this Contract except as provided in Section XII (Requests for Modifications). The Contracting Authority agrees to make good faith efforts to keep the number of cases assigned within the variance level. In no event shall the Agency be required to accept cases above the level of the variance, even for extra compensation, if doing so would imperil the ability of the Agency's attorneys to maintain the maximum caseload standards provided in Section VI (Performance Requirements). The Contracting Authority shall provide the Agency with quarterly estimates of caseload to be assigned at least one month prior to the beginning of each calendar quarter and shall make available, upon request, the data and rationale which form the basis of such estimate(s).

## **IX. ASSIGNMENT OF COMPLEX LITIGATION CASES**

[If assignment of Complex Litigation cases is contemplated by this Contract,] the Agency will designate a full time or FTE attorney for that purpose. Thereafter, the Agency shall accept all Complex Litigation cases assigned to it by Contracting Authority subject to the following special provisions:

- A. The Contracting Authority shall not assign further Complex Litigation cases while the Agency has a pending Complex Litigation case, unless the Agency has available qualified staff and the Contracting Authority provides the necessary resources.
- B. In the event the Agency attorney designated to handle Complex Litigation is not occupied with a Complex Litigation case, Contracting Authority may increase the assignment of other felony cases up to 12.5 per month.
- C. Should the services of an additional FTE attorney be required due to the pendency of a Capital case, the Contracting Authority and the Agency will negotiate a reduction in Agency caseload or provision of extra compensation to provide for the services of that attorney.
- D. Once a Complex Litigation case has proceeded for two months, Contracting Authority may request a review of the case, including but not limited to hours spent by the agency attorney(s) and the expected duration of the case. Such review may result in reclassification of the case or modification in payment structure to ensure that the requirements of Sections V.G. and VI. G above can be met.

## **X. ATTORNEY TRAINING**

Ongoing professional training is a necessity in order for an attorney to keep abreast of changes and developments in the law and assure continued rendering of competent assistance of counsel. The Agency shall provide sufficient training, whether in-house or through a qualified provider of CLE, to keep all of its attorneys who perform work under this Contract abreast of developments in relevant law, procedure, and court rules. If an attorney is transferred to a particular type of case (*e.g.* a Capital case or other Complex litigation after having participated in the required seven hours of annual CLE required in Section V.A, the Agency shall require additional training in the particular type of case, as necessary.

## **XI. ATTORNEY EVALUATION**

If the caseload in this Contract requires the services of two or more attorneys, the Agency director, or his/her designee, shall evaluate the professional performance of Agency attorneys annually. Evaluations should include monitoring of time and caseload records, review of case files, and in court observation. The Agency shall make available to Contracting Authority its evaluation criteria and evidence that evaluations were conducted,

although all evaluations are to be confidential between the Agency's director and the Agency attorney.

## **XII. COMPENSATION AND METHOD OF PAYMENT**

- A. For the term of this contract, the Contracting Authority shall pay the Agency a rate of \$\_\_\_\_\_ for the caseload specified on Worksheet A, plus or minus the variance agreed to in Section VII (Variance). Payments will be made on a monthly basis. It is possible that the actual amount of compensation will vary according to other terms of this Contract. The parties contemplate that attorneys working under this Contract will be compensated comparably to prosecutors of similar experience and responsibility.
- B. The Contracting Authority shall provide the Agency with a certification of case assignments 10 working days after the close of each calendar month. The Agency shall return the signed certification within 10 working days of receipt. The Contracting Authority will pay the Agency by the 8th working day of the following month.
- C. If services in addition to those called for by this Contract are required because of unexpected increases in annual caseload(s), the Contracting Authority shall provide supplemental funding to the Agency at a rate to be negotiated which is commensurate with the rate paid under this Contract (or, in the event that new categories of cases (e.g. Capital cases or other Complex Litigation) are added, commensurate with the rate prosecutors receive for similar work) and the actual cost to the Agency of providing the extra service. This provision in no way limits the right of the Agency to refuse to accept cases in excess of the agreed caseload and variance as described in Section VII (Variance).
- D. If the number of cases assigned by the Contracting Authority falls below the agreed caseload and variance, the Contracting Authority will remain liable for the full rate agreed unless it has complied with the provisions in Section XII (Request for Modifications).
- E. In the event of Agency failure to substantially comply with any items and conditions of this Contract or to provide in any manner the work or services as agreed to herein, the Contracting Authority reserves the right to withhold any payment until corrective action has been taken or completed. This option is in addition to and not in lieu of the Contracting Authority's right to termination as provided in Section XIX of this Contract.

## **XIII. REQUESTS FOR CONTRACT MODIFICATIONS**

The Contracting Authority shall evaluate the number of cases assigned to the Agency and make projections as to the number of cases that will be assigned to the Agency in future months. These projections will be provided to the Agency on a quarterly basis as specified in Section VII (Variance). If the projection indicates that the cases assigned to the Agency

will exceed the variance, the Contracting Authority will negotiate with the Agency for supplemental funding to cover the increased caseload, commensurate with the rate paid in this Contract and the actual cost of providing representation. The Agency shall have the right without penalty to refuse to accept additional cases beyond the agreed caseload and variance in order to preserve its ability to manage the caseloads of its attorneys as specified in Section VII (Variance).

If the Contracting Authority determines that forces beyond its control such as an unexpected decline in availability of cases for assignment will require the number of cases assigned to the Agency to drop below the agreed caseload and variance, the Contracting Authority may request renegotiation of the rate to be paid under this contract in writing no less than 30 days prior to the date that any change would become effective. Both parties agree in these circumstances to negotiate in good faith for a new rate proportionate to the rate paid under this Contract, taking into account the expenses incurred by the Agency and the Agency's opportunity to realize cost savings and devote resources to other work.

In addition, the Agency may submit a request for modification to the Contracting Authority in order to request supplemental funding if the Agency finds that the funding provided by the Contract is no longer adequate to provide the services required by the Contract. Such a request shall be based on an estimate of actual costs necessary to fund the cost of services required and shall reference the entire Agency budget for work under this Contract to demonstrate the claimed lack of funding. Contracting Authority shall respond to such request within 30 days of receipt. Should such supplemental funding not be approved, Contracting Authority shall notify the Agency within 30 days of the finding of the request that the supplemental funds shall not be available.

#### **XIV. REPORTS AND INSPECTIONS**

The Agency agrees to submit to the Contracting Authority the following reports at the times prescribed below. Failure to submit required reports may be considered a breach of this contract and may result in the Contracting Authority withholding payment until the required reports are submitted and/or invocation of the Corrective Action procedures in Section XVIII (Corrective Action).

##### **A. Position Salary Profile**

The Agency shall submit to the Contracting Authority on the last working day in January and by the 15th day of the first month of each subsequent quarter, a profile of Full-Time Equivalent (FTE) positions for both legal and support staff who perform work on this Contract, distributed by type of case. The report will designate the name and salary for each FTE employee in a format to be provided. The Contracting Authority will not release this information except as required by law. If the employee splits his/her work between work under this Contract and other business, the report will indicate the amount of time that employee devotes to private matters compared to work under this Contract.

##### **B. Caseload Reports**

By the seventh day of the month, the Agency will report the number of cases completed in the past month, separated by category, to the Contracting Authority Administrator.

C. Expenditure Reports

Within 20 days of the last day of each calendar month, the Agency will certify to Contracting Authority a monthly report of the prior month's expenditures for each type of case handled, in the format to be provided. Expenditure reporting shall be on an accrual basis.

D. Annual Subcontract Attorney Use Report

If the Agency uses any subcontract attorneys in accordance with Section XXI (Assignment and Subcontracting), the Agency shall submit to Contracting Authority a summary report.

E. Bar Complaints

The Agency will immediately notify the Contracting Authority in writing when it becomes aware that a complaint lodged with the [state Bar Association/disciplinary body] has resulted in reprimand, suspension, or disbarment of any attorney who is a member of the Agency's staff or working for the Agency.

F. Inspections

The Agency agrees to grant the Contracting Authority full access to materials necessary to verify compliance with all terms of this Contract. At any time, upon reasonable notice during business hours and as often as the Contracting Authority may reasonably deem necessary for the duration of the Contract and a period of five years thereafter, the Agency shall provide to the Contracting Authority right of access to its facilities, including those of any subcontractor, to audit information relating to the matters covered by this Contract. Information that may be subject to any privilege or rules of confidentiality should be maintained by the Agency in a way that allows access by the Contracting Authority without breaching such confidentiality or privilege. The Agency agrees to maintain this information in an accessible location and condition for a period of not less than five years following the termination of this Contract, unless the Contracting Authority agrees in writing to an earlier disposition. Notwithstanding any of the above provisions of this paragraph, none of the Constitutional, statutory, and common law rights and privileges of any client are waived by this agreement. The Contracting Authority will respect the attorney-client privilege.

**XV. ESTABLISHMENT AND MAINTENANCE OF RECORDS**

- A. The Agency agrees to maintain accounts and records, including personnel, property, financial, and programmatic records, which sufficiently and properly reflect all direct

and indirect costs of services performed in the performance of this Contract, including the time spent by the Agency on each case.

- B. The Agency agrees to maintain records which sufficiently and properly reflect all direct and indirect costs of any subcontracts or personal service contracts. Such records shall include, but not be limited to, documentation of any funds expended by the Agency for said personal service contracts or subcontracts, documentation of the nature of the service rendered, and records which demonstrate the amount of time spent by each subcontractor personal service contractor rendering service pursuant to the subcontract or personal service contract.
- C. The Agency shall have its annual financial statements relating to this Contract audited by an independent Certified Public Accountant and shall provide the Contracting Authority with a copy of such audit no later than the last working day in July. The independent Certified Public Accountant shall issue an internal control or management letter and a copy of these findings shall be provided to the Contracting Authority along with the annual audit report. All audited annual financial statements shall be based on the accrual method of accounting for revenue and expenditures. Audits shall be prepared in accordance with Generally Accepted Auditing Standards and shall include balance sheet, income statement, and statement of changes in cash flow.
- D. Records shall be maintained for a period of 5 years after termination of this Contract unless permission to destroy them is granted by the Contracting Authority.

#### **XVI. HOLD HARMLESS AND INDEMNIFICATION**

- A. The Contracting Authority assumes no responsibility for the payment of any compensation, wages, benefits, or taxes by the Agency to Agency employees or others by reason of the Contract. The Agency shall protect, indemnify, and save harmless the Contracting Authority, their officers, agents, and employees from and against any and all claims, costs, and losses whatsoever, occurring or resulting from Agency's failure to pay any compensation, wages, benefits or taxes except where such failure is due to the Contracting Authority's wrongful withholding of funds due under this Contract..
- B. The Agency agrees that it is financially responsible and liable for and will repay the Contracting Authority for any material breaches of this contract including but not limited to misuse of Contract funds due to the negligence or intentional acts of the Agency, its officers, employees, representatives or agents.
- C. The Contracting Authority shall indemnify and hold harmless the Agency and its officers, agents, and employees, or any of them, from any and all claims, actions, suits, liability, loss, costs, expenses, and damages of any nature whatsoever, by reason of or arising out of any action or omission of the Contracting Authority, its officers, agents, and employees, or any of them, relating or arising out of the performance of

this Contract. In the event that any suit based upon such a claim, action, loss, or damage is brought against the Agency, the Contracting Authority shall defend the same at its sole cost and expense and if a final judgment is rendered against the Agency and the Contracting Authority and their respective officers, agents, and employees, or any of them, the Contracting Authority shall satisfy the same.

## XVII. INSURANCE

Without limiting the Agency's indemnification, it is agreed that the Agency shall maintain in force, at all times during the performance of this Contract, a policy or policies of insurance covering its operation as described below.

### A. General Liability Insurance

The Agency shall maintain continuously public liability insurance with limits of liability not less than: \$250,000 for each person, personal injury, \$500,000 for each occurrence, property damage, liability, or a combined single limit of \$500,000 for each occurrence, personal injury and/or property damage liability.

Such insurance shall include the Contracting Authority as an additional insured and shall not be reduced or canceled without 30 days' prior written notice to the Contracting Authority. The Agency shall provide a certificate of insurance or, upon written request of the Contracting Authority, a duplicate of the policy as evidence of insurance protection.

### B. Professional Liability Insurance

The Agency shall maintain or ensure that its professional employees maintain professional liability insurance for any and all acts which occur during the course of their employment with the Agency which constitute professional services in the performance of this Contract.

For purposes of this Contract, professional services shall mean any services provided by a licensed professional.

Such professional liability insurance shall be maintained in an amount not less than \$1,000,000 combined single limit per claim/aggregate. The Agency further agrees that it shall have sole and full responsibility for the payment of any funds where such payments are occasioned solely by the professional negligence of its professional employees and where such payments are not covered by any professional liability insurance, including but limited to the amount of the deductible under the insurance policy. The Agency shall not be required to make any payments for professional liability, if such liability is occasioned by the sole negligence of the Contracting Authority. The Agency shall not be required to make payments other than its judicially determined percentage, for any professional liability which is determined by a court of competent jurisdiction to be the result of the comparative negligence of the Agency and the Contracting Authority.

Such insurance shall not be reduced or canceled without 30 days' prior written notice to the Contracting Authority. The Agency shall provide certificates of insurance or, upon written request of the Contracting Authority, duplicates of the policies as evidence of insurance protection.

C. Automobile Insurance

The Agency shall maintain in force at all times during the performance of this contract a policy or policies of insurance covering any automobiles owned, leased, hired, borrowed or used by any employee, agent, subcontractor or designee of the Agency to transport clients of the Agency.

Such insurance policy or policies shall specifically name the Contracting Authority as an additional insured. Said insurance coverage shall be primary insurance with respect to the Contracting Authority, and any insurance, regardless of the form, maintained by the Contracting Authority shall be excess of any insurance coverage which the Agency is required to maintain pursuant to this contract.

Automobile liability as stated herein shall be maintained at \$500,000 combined single limit per accident for bodily injury and property damage.

D. Workers' Compensation

The Agency shall maintain Workers' Compensation coverage as required by the [state statutory reference].

The Agency shall provide a certificate of insurance or, upon written request of the Contracting Authority, a certified copy of the policy as evidence of insurance protection.

## **XVIII. EVALUATION GUIDELINES**

The Contracting Authority will review information obtained from the Agency to monitor Agency activity, including attorney caseloads, support staff/attorney ratios for each area of cases, the experience level and supervision of attorneys who perform Contract work, training provided to such attorneys, and the compensation provided to attorneys and support staff to assure adherence.

## **XIX. CORRECTIVE ACTION**

If the Contracting Authority reasonably believes that a material breach of this Contract has occurred, warranting corrective action, the following sequential procedure shall apply:

1. The Contracting Authority will notify the Agency in writing of the nature of the breach.

2. The Agency shall respond in writing within five (5) working days of its receipt of such notification, which response shall present facts to show no breach exists or indicate the steps being taken to correct the specified deficiencies, and the proposed completion date for bringing the Contract into compliance.
3. The Contracting Authority will notify the Agency in writing of the Contracting Authority's determination as to the sufficiency of the Agency's corrective action plan. The determination of the sufficiency of the Agency's corrective action plan will be at the discretion of the Contracting Authority and will take into consideration the reasonableness of the proposed corrective action in light of the alleged breach, as well as the magnitude of the deficiency in the context of the Contract as a whole. In the event the Agency does not concur with the determination, the Agency may request a review of the decision by the Contracting Authority Executive. The Contracting Authority agrees that it shall work with the Agency to implement an appropriate corrective action plan.

In the event that the Agency does not respond to the Contracting Authority's notification within the appropriate time, or the Agency's corrective action plan for a substantial breach is determined by the Contracting Authority to be insufficient, the Contracting Authority may commence termination of this Contract in whole or in part pursuant to Section XIX (Termination and Suspension).

In addition, the Contracting Authority reserves the right to withhold a portion of subsequent payments owed the Agency which is directly related to the breach of the Contract until the Contracting Authority is satisfied the corrective action has been taken or completed as described in Section XI (Compensation and Method of Payment).

## **XX. TERMINATION AND SUSPENSION**

- A. The Contracting Authority may terminate this Contract in whole or in part upon 10 days' written notice to the Agency in the event that –
  1. The Agency substantially breaches any duty, obligation, or service required pursuant to this Contract;
  2. The Agency engages in misappropriation of funds; or
  3. The duties, obligations, or services herein become illegal, or not feasible.

Before the Contracting Authority terminates this Contract pursuant to Section XIX. A.1, the Contracting Authority shall provide the Agency written notice of termination, which shall include the reasons for termination and the effective date of termination. The Agency shall have the opportunity to submit a written response to the Contracting Authority within 10 working days from the date of the Contracting Authority's notice. If the Agency elects to submit a written response, the Contracting Authority Administrator will review the response and make a determination within 10

days after receipt of the Agency's response. In the event the Agency does not concur with the determination, the Agency may request a review of the decision by the Contracting Authority Executive. In the event the Contracting Authority Executive reaffirms termination, the Contract shall terminate in 10 days from the date of the final decision of the Contracting Authority Executive. The Contract will remain in full force pending communication of the Contracting Authority Executive to the Agency. A decision by the Contracting Authority Executive affirming termination shall become effective 10 days after it is communicated to the Agency.

- B. The Agency reserves the right to terminate this Contract with cause with 30 days written notice should the Contracting Authority substantially breach any duty, obligation or service pursuant to this Contract. In the event that the Agency terminates this Contract for reasons other than good cause resulting from a substantial breach of this Contract by the Contracting Authority, the Agency shall be liable for damages, including the excess costs of the procurement of similar services from another source, unless it is determined by the Contracting Authority Administrator that (i) no default actually occurred, or (ii) the failure to perform was without the Agency's control, fault or negligence.
- C. In the event of the termination or suspension of this Contract, the Agency shall continue to represent clients that were previously assigned and the Contracting Authority will be liable for any payments owed for the completion of that work. The Agency will remit to the Contracting Authority any monies paid for cases not yet assigned or work not performed under the Contract. The Contracting Authority Administrator may request that the Agency attempt to withdraw from any case assigned and not completed. Should a court require, after the Agency has attempted to withdraw, the appearance of counsel from the Agency on behalf of any client previously represented by the Agency where such representation is no longer the obligation of the Agency pursuant to the terms of this Contract, the Contracting Authority will honor payment to the Agency upon judicial verification that continued representation is required.
- D. In the event that termination is due to misappropriation of funds, non-performance of the scope of services, or fiscal mismanagement, the Agency shall return to the Contracting Authority those funds, unexpended or misappropriated, which, at the time of termination, have been paid to the Agency by the Contracting Authority.
- E. Otherwise, this Contract shall terminate on the date specified herein, and shall be subject to extension only by mutual agreement of both parties hereto in writing.
- G. Nothing herein shall be deemed to constitute a waiver by either party of any legal right or remedy for wrongful termination or suspension of the Contract. In the event that legal remedies are pursued for wrongful termination or suspension or for any other reason, the non-prevailing party shall be required to reimburse the prevailing party for all attorney's fees.

## **XXI. RESPONSIBILITY OF MANAGING DIRECTOR OF AGENCY**

The managing director of the Agency shall be an attorney licensed to practice law in the State of \_\_\_\_\_. The managing director of the Agency shall be ultimately responsible for receiving or depositing funds into program accounts or issuing financial documents, checks, or other instruments of payment provided pursuant to this Contract.

## **XXII. ASSIGNMENT/SUBCONTRACTING**

- A. The Agency shall not assign or subcontract any portion of this Contract without consent of the Contracting Authority. Any consent sought must be requested by the Agency in writing not less than five days prior to the date of any proposed assignment or sub-contract, provided that this provision shall not apply to short-term personal service contracts with individuals to perform work under the direct supervision and control of the Agency. Short-term personal service contracts include any contract for a time period less than one year. Any individuals entering into such contracts shall meet all experience requirements imposed by this Contract. The Contracting Authority shall be notified of any short-term contracts which are renewed, extended or repeated at any time throughout the Contract.
- B. The term "Subcontract" as used above shall not be read to include the purchase of support services that do not directly relate to the delivery of legal services under the Contract to clients of the Agency.
- C. The term "Personal Service Contract" as used above shall mean a contract for the provision of professional services which includes but is not limited to counseling services, consulting services, social work services, investigator services and legal services.

## **XXIII. RENEGOTIATION**

Either party may request that the provisions of this Contract be subject to renegotiation. After negotiations have occurred, any changes which are mutually agreed upon shall be incorporated by written amendments to this Contract. Oral representations or understandings not later reduced to writing and made a part of this agreement shall not in any way modify or affect this agreement.

## **XXIV. ATTORNEYS' FEES**

In the event that either party pursues legal remedies, for any reason, under this agreement, the non-prevailing party shall reimburse costs and attorneys' fees of the prevailing party.

## **XXV. NOTICES**

Whenever this Contract provides for notice to be provided by one party to another, such notice shall be:

1. In writing; and
2. Directed to the Chief Executive Officer of the Agency and the director/manager of the Contracting Authority department/division specified on page 1 of this Contract.

Any time limit by which a party must take some action shall be computed from the date that notice is received by said party.

#### **XXVI. THE PARTIES' ENTIRE CONTRACT/WAIVER OF DEFAULT**

The parties agree that this Contract is the complete expression of the terms hereto and any oral representations of understanding not incorporated herein are excluded. Both parties recognize that time is of the essence in the performance of the provisions of this Contract.

Waiver of any default shall not be deemed to be a waiver of any subsequent default. Waiver of a breach of any provision of this Contract shall not be deemed to be a waiver of any other subsequent breach and shall not be construed to be a modification of the terms of this agreement unless stated to be such through written mutual agreement of the parties, which shall be attached to the original Contract.

#### **XXVII. NONDISCRIMINATION**

During the performance of this Contract, neither the Agency nor any party subcontracting with the Agency under the authority of this Contract shall discriminate on the basis of race, color, sex, religion, national origin, creed, marital status, age, sexual orientation, or the presence of any sensory, mental, or physical handicap in employment or application for employment or in the administration or delivery of services or any other benefit under this agreement.

The Agency shall comply fully with all applicable federal, state, and local laws, ordinances, executive orders, and regulations which prohibit such discrimination.

#### **XXVIII. CONFLICT OF INTEREST**

##### **A. Interest of Members of Contracting Authority and Agency**

No officer, employee, or agent of the Contracting Authority, or the State of \_\_\_\_\_, or the United States Government, who exercises any functions or responsibility in connection with the planning and implementation of the program funded herein shall have any personal financial interest, direct or indirect, in this Contract, or the Agency.

##### **B. Interests of Agency Directors, Officers, and Employees**

The following expenditures of Contract funds shall be considered conflict of interest expenditures and prima facie evidence of misappropriation of Contract funds without prior disclosure and approval by the Administrator of the Contracting Authority:

1. The employment of an individual, either as an employee of the Agency or as an independent consultant, who is either: (a) related to a director of the Agency; (b) employed by a corporation owned by a director of the Agency, or relative of a director of the Agency. This provision shall not apply when the total salary to be paid to the individual pursuant to his employment agreement or employment contract would be less than \$1500 per annum.
  
2. The acquisition or rental by the Agency of real and/or personal property owned or rented by either: (a) an Agency officer, (b) an Agency director, (c) an individual related to an Agency officer or Agency director, or (d) a corporation owned by the Agency, an Agency director, an Agency officer, or relative of an Agency officer or director.

Agreed:

\_\_\_\_\_  
Agency

\_\_\_\_\_  
Contracting Authority

Date: \_\_\_\_\_

Date: \_\_\_\_\_

**Worksheet A**

The Agency agrees to accept the following cases from the Contracting Authority for the duration of this Contract for the rates shown, subject to the terms of this Agreement:

| <b><u>Case Type</u></b>      | <b><u>Annual Caseload</u></b> | <b><u>Monthly Caseload</u></b> | <b><u>Payment</u></b> |
|------------------------------|-------------------------------|--------------------------------|-----------------------|
| Adult Felony                 |                               |                                |                       |
| Adult Misdemeanor            |                               |                                |                       |
| Juvenile Offender            |                               |                                |                       |
| Juvenile Dependency          |                               |                                |                       |
| Civil Commitment             |                               |                                |                       |
| Misdemeanor Appeal           |                               |                                |                       |
| [Specialty Courts;<br>Other] |                               |                                |                       |
| <b><u>Total:</u></b>         |                               |                                |                       |

The Agency agrees to provide the following other services for the Contracting Authority for the rate shown, subject to the terms of this agreement:

| <b><u>Service</u></b>    | <b><u>Payment</u></b> |
|--------------------------|-----------------------|
| Complex Litigation       |                       |
| 24 Hour Advisory Service |                       |
| In Custody Arraignments  |                       |
| [Other]                  |                       |
| <b><u>Total:</u></b>     |                       |



# GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES

## Introduction

These Guidelines represent the combined efforts of defender members of the National Legal Aid and Defender Association, the Defender Committee and the Defender Division staff to address the problems of providing by competitively bid contract legal representation for poor persons accused of criminal offenses. Some competitively bid contract defense programs have proven neither as economical as hoped nor as satisfactory in providing good representation as the federal and state constitutions may require. Nevertheless some state and local governments are establishing competitively bid contract defense programs, in some instances as the sole means of providing representation to poor defendants. These Guidelines are intended to help local and state governments and agencies which choose to establish contract defense programs and which choose to award contracts on a competitive basis to do so constitutionally, and to help insure that efficient contract programs operate well for the government, the courts and the citizens they serve.

These Guidelines focus on the contracting process. Contracts written, negotiated and entered into in accordance with these Guidelines and with consideration of the issues these Guidelines raise should, by their terms, help ensure that high quality service will be provided to those defendants unable to afford counsel. Such contracts should also provide to the criminal justice system effective defense services which comport with government's other interests in efficiency, economy and accountability. The Guidelines are intended to be a practical document. Public agencies or officials charged with designing contract programs for indigent criminal defense may use these Guidelines to help avoid problems frequently encountered and to design, negotiate and award contracts which will encourage, rather than discourage, zealous, effective and efficient representation of indigent accused.

There are now several published standards which spell out the objectives and minimum requirements for public defender and assigned counsel programs and for attorneys engaged in private criminal justice. These include the American Bar Association's Standards for Criminal Justice (Second Edition 1980), NLADA's Standards for Defense Services Justice (1976), the Report of the National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States (1976), and the volume of standards published by the National Advisory Commission On Criminal Justice Standards and Goals titled Courts (1973). These standards do not directly address the unique characteristics or special problems of competitively bid contract defense programs. However, they do speak to the quality of defense services generally. Their provisions are as relevant to attorneys practicing under contract as to assigned counsel or attorneys in full-time public defender offices. Where such standards are in any way relevant or useful to competitive bid contract defense systems these Guidelines refer to them as "Related Standards." But while these Guidelines intend to reflect existing standards and to help implement them in the context of competitively bid contract defense programs, they do not restate them and are not a substitute for them.

These Guidelines draw upon several published and unpublished sources, including the various Standards referred to above. The text of, and comments to, these Guidelines contain short citations to those sources. Full citations are listed in Appendix A (Bibliography of Materials Cited) behind the short citation form by which they are referred in the text.

## HISTORY OF THESE STANDARDS

Competitively bid contract defense systems are relatively new. The authorities and standards governing systems used to provide criminal defense services either neglect, or condemn, contract systems,

particularly competitively bid contract systems. See Wilson, Contract Bid Programs. Competitively bid contract systems have provoked a great deal of controversy and concern. Wilson, id. As a result, the National Legal Aid and Defender Association began consider the issues that arose when jurisdictions elected to provide criminal defense services to poor persons through competitively bid contracts with lawyers or legal organizations. Ultimately, the Association produced these Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, but only after consideration, study and deliberation.

The foundation for the Guidelines as they appear here was laid by a subcommittee of the Defender Committee of the NLADA during the Association's meetings in Washington, D.C., on May 17, 1980. Designated originally as the Subcommittee on Accreditation, over the next two years this group evolved into the Subcommittee on Contracts and Accreditation. It met during NLADA's quarterly meetings and slowly became prominent in the Defender Committee's agenda.

On December 17, 1981, the subcommittee assigned to itself the task of reviewing standards and guidelines of the NLADA, ABA, and the National Advisory Commission on Criminal Justice Standards and Goals (NAC), and to consider an appropriate response to contract bid program . In the course of its deliberation, the subcommittee noted that several counties had referred the question of establishing contract systems to local bar associations. Jonathan Gradess, Executive Director of the New York State Defenders Association, proposed preparing information about contract defense programs which would simultaneously warn county governments of the dangers of contract bid programs and assist them and local bar groups in assuring cost effective quality representation. The Committee and NLADA staff began a serious effort to review existing standards and collect and publish information about contract defense programs.

At a meeting in Washington, D.C. in May 1982 the Subcommittee on Contracts and Accreditation focused on identifying the issues and problems associated with contract programs and continued to collect and assimilate information. The subcommittee decided to prepare and promulgate minimum standards for letting defense services contracts. On, the same day, the NLADA Defender Committee considered the content and impact of Richard J. Wilson's article, Contract Bid Programs, supra, and passed the following resolution (prefatory "whereas" clauses not reprinted):

BE IT THEREFORE RESOLVED:

1. THAT the National Legal Aid and Defender Association opposes the continued use and further proliferation of contracts which do not comply with the ABA Code of Professional Responsibility or nationally recognized standards on providing indigent defense services; and
2. THAT the National Legal Aid and Defender Association strongly urges that, if used, such contracts must insure quality delivery in compliance with the constitutional mandate of effective counsel, in addition to the cost efficiency of such services.

At meetings in Atlanta on July 30, 1982 the Subcommittee on Contracts and Accreditation again proposed preparation of guidelines for counties which were considering contract defense systems and requested consideration of the matter at NLADA's Annual Conference. The Defender Committee considered for the first time the "Discussion Draft, Standards for Contract Defense Systems" prepared by subcommittee chair Nancy Albert-Goldberg and based upon discussions and research undertaken over the preceding two years. At the Annual Conference in Boston in November 1982, the subcommittee adopted the Goldberg Discussion Draft, with several amendments, and submitted the Draft to the Defender Committee for approval. However, due to the press of other business, the Defender Committee deferred action on the Goldberg draft. In early 1983, Alex Landon, the new chair of the Subcommittee on Contracts and Accreditation, prepared a new draft, circulated it, and re-submitted it after staff review to the Committee. On September 19, 1983 in Philadelphia, the

Subcommittee on Contracts and Accreditation and the NLADA Defender Division staff submitted the Proposed Draft, Guidelines for Negotiating and Awarding Indigent Defense Contracts for review and action to the Defender Committee. The Defender Committee made several minor changes in the text of the Proposed Draft, directed addition of one additional Guideline, and approved the Proposed Draft for circulation and comment before submission to NLADA's Board of Directors.

Within two months of the September, 1983 meetings, the Defender Division printed and circulated a Tentative Draft of these Guidelines dated 19 September, 1983. Distribution included the Defender Committee and Board, persons who had contributed to or expressed an interest in the Guidelines, and various organizations including the staff of the American Bar Association's Criminal Justice Section. The Defender Division staff received comments from several persons and circulated these to the Sub-committee on Contracts and Accreditation. As a result of those comments, several changes to the text and one additional Guideline were proposed to the Defender Committee at its meetings in Washington on 24 February 1984. The Defender Committee considered the changes and additions and voted to approve and publish the Guidelines. The Board of the National Legal Aid and Defender Association formally approved the Guidelines by mail ballot following its meeting on 25 February, 1984.

The guidelines are designed to protect the integrity of systems which provide constitutionally required public defense services. They were created to protect the rights of defendants and taxpayers and to encourage zealous and effective representation of the poor. The guidelines have already been utilized by the Supreme Court of Arizona to condemn a constitutionally defective and fundamentally inadequate competitively bid contract system.

These guidelines must therefore be viewed for what they are. They are simultaneously designed to respond to penny-wise, pound-foolish actions taken by good governments wishing to cut costs at the expense of quality and to help assure for good governments an approach to providing quality service which will prevent municipal liability.

As stated in the preamble, infra, the guidelines neither endorse nor support competitively bid contract defense systems. Rather, they are an effort designed to provide assurance that minimum constitutional requirements are met when local governments choose to serve poor clients through a contract defense system.

#### PART I: DEFINITIONS: "CONTRACTING AUTHORITY" AND "CONTRACTOR"

Guideline I-1: Contracting Authority. As used in these Guidelines, the Contracting Authority is the public office, officer, or agency which has the authority to prepare bids, negotiate, or otherwise conclude a contract and to obligate funds for those unable to afford criminal defense services.

Guideline I-2: Contractor. As defined in these Guidelines, the Contractor is an attorney, law firm, professional association, lawyer's association, law school, bar association or non-profit organization which enters into, or is eligible to enter into, a competitive bidding or open negotiating process with the Contracting Authority for the purpose of concluding a contract to provide public defense services to those unable to afford counsel.

#### PART II: POLICY BOARD

Guideline II-1: Purposes. The Contracting Authority should appoint a Policy Board if it has appointment powers, or should request that an appropriate authority appoint a Policy Board if it lacks the power of appointment itself. Policy Boards should be constituted to ensure the independence of the Contractor and to provide the Contracting Authority with expertise and support in such matters as criminal defense functions,

determination of attorneys fees and salary levels, determination of reasonable caseload standards, interpretation of standards governing the provision of public defense services, response to community and client concerns, and implementation of the contract defense system.

Guideline II-2: Members. The Policy Board should consist of from three to thirteen members, depending upon the size of the community the number of identifiable factions or components of the client population, and judgments as to which groups should be represented.

Policy Board members should be appointed using the following criteria:

- (a) appointees should be persons who will ensure the independence of Contractor.
- (b) Policy Board members should represent a diversity of factions in order to insure insulation from partisan politics.
- (c) No single branch of government should have a majority of votes on the Policy Board.
- (d) Private organizations directly serving the poor should be a source for Board members.
- (e) Organizations concerned with the problems of the client community should be represented on the Policy Board.
- (f) A majority of persons on the Board should be practicing attorneys.
- (g) The Policy Board should not include judges, prosecutors, or law enforcement officials.
- (h) Members of the Policy Board should serve staggered terms in order to ensure continuity and to avoid upheaval.

Guideline II-3: Duties. Duties of the Policy Board shall be to:

- (a) advise the contracting Authority about, and approve, the terms and minimum requirements of any contract for defense services; and
- (b) advise the Contracting Authority on fee schedules, rate of reimbursement, prevailing attorneys fees and other issues related to the cost of public defense services.
- (c) supervise the contract bidding and award process, if not retained by the Contracting Authority;
- (d) select the contract defender or contract defender to whom contract will be let, if not retained by the Contracting Authority; and
- (e) establish and apply minimum qualifications for lawyers whose services are provided by the Contractor, if this function is not assigned to the contractor as a condition of the contract.

### PART III: ELEMENTS OF A CONTRACT FOR PUBLIC DEFENSE SERVICES

Each of the following Guidelines should be included in a contract for public defense services. If contracts are to be awarded through some kind of bidding, RFP, or other competition, these should serve as the basis for

the RFP or bidding document. Contracts should be awarded on the basis of the completeness and adequacy of a Contractor's consideration of these Guidelines.

Guideline III-1: Parties. The contract should identify the Contracting Authority, the Contractor, and any other public or private person, agencies or organizations which are party to the contract.

Guideline III-2: Scope of Contract. The contract should specify the categories of cases in which the Contractor is to provide services.

Guideline III-3: Determination of Eligibility. The Contract should specify the procedure by which client financial eligibility is to be determined and the person, officer or agency responsible for making the determination initially and at subsequent review proceedings. The contract should either incorporate eligibility standards by reference to those in accepted use or it should specify the eligibility standard applicable in all cases handled by the Contractor. The contract should provide that any information or statements of the defendant obtained in the process of determining eligibility shall be considered confidential and privileged.

Guideline III-4: Term of Contract. Contracts for legal defense service should be awarded for at least two year terms. Removal of the Contractor short of the agreed term should be for good cause only.

Guideline III-5: Definition of "Good Cause." The Contract shall define "good cause" such as is required for removal of the Contractor (Guideline III-4 as: failure by the Contractor to comply with the terms of the contract to an extent that the delivery of services to clients by the Contractor is impaired or rendered impossible, or a willful disregard by the Contractor of the rights and best interests of clients under this contract such as leaves them impaired. The individual actions of the Contractor or any one attorney taken in connection with one case alone, shall not necessarily constitute "good cause" for removal.

Guideline III-6: Allowable Caseloads. The contract should specify a maximum allowable caseload for each full-time attorney, or equivalent, who handles cases through the contract. Caseloads should allow each lawyer to give every client the time and effort necessary to provide effective representation. Attorneys employed less than full-time on handling a mix of cases should handle a proportional caseload.

Guideline III-7: Minimum Professional Qualifications. The Contract should specify minimum qualifications for staff lawyers. These qualifications should be developed by the Advisory Board which screens contract applications. If defense services are to be provided in more than one category of cases, the contract should specify different minimum-qualifications for each category of cases for which the Contractor will provide services.

Guideline III-8: Support Staff and Forensic Experts. The contract should provide for employment of secretaries, social work staff, mental health professionals, forensic experts and support staff to perform tasks not requiring legal credentials or experience and tasks for which support staff and forensic experts possess special skills. Such skills are particularly important in ensuring effective performance of defense counsel at the bail, pretrial release, investigation and sentencing stages, and in the preparation of dispositional plans.

- (a) Secretaries. The contract should provide an adequate number of secretaries to ensure competent representation to clients and adequate assistance to attorneys.
- (b) Social Service Personnel. The contract should provide an adequate number of social service personnel to assist at and their clients.

- (c) Mental Health Professionals. The contract should specifically include funds for confidential hiring of mental health professionals to perform evaluations and to assist at trial, unless mental health professionals are provided to the contractor to perform mental evaluations by court order or otherwise upon request.
- (d) Forensic and Other Experts. The contract should specifically include funds for confidential hiring of forensic and other experts and for the use of forensic experts at trial.

Guideline III-9: Investigators. The contract should specify that adequate investigation services necessary to provide competent representation shall be available to the Contractor. No contract clause should interfere with the contracting attorneys selection, supervision, or direction of investigators.

Guideline III-10: Compensation. The contract shall provide that the Contractor compensate:

- (a) its staff, employees, subcontractors and retained forensic experts at rates commensurate with their training, experience and responsibilities and with compensation paid to persons doing similar work in public agencies in the jurisdiction, and
- (b) attorneys at a minimum rate which reflects the following factors:
  - (1) the customary compensation in the community for similar services rendered by privately retained counsel to a paying client or government or other publicly-paid attorneys to a public client;
  - (2) the time and labor required to be spent by the attorney;
  - (3) the degree of professional ability, skill and experience called for and exercised in the performance of the services.

Guideline III-11: Special Case Compensation. The contract should provide for reasonable compensation over and above the normal contract price for cases which require an extraordinary amount of time and preparation, including but not limited to, capital cases. Services which require special fees should be determined in the contract.

Guideline III-12: Case and Work-Overload. The contract should provide that the Contractor may decline to represent clients at no penalty in the event that during the contract:

- (a) the caseload assigned to the Contractor exceeds the allowable caseloads specified through the process recommended in Guideline III-5; or
- (b) the Contractor is assigned more cases requiring an extraordinary amount of time and preparation than the Contractor can competently handle even with payment of extraordinary compensation as specified in Guideline III-11; or
- (c) the cases assigned to the Contractor exceed any number that the, contract specified or that the Contractor and Contracting Authority reasonably anticipated at the time the contract was concluded.

Guideline III-13: Conflicts of Interest. The contract should avoid creating conflicts of interest between Contractor or individual defense attorney and clients. Specifically:

- (a) expenses for investigations, expert witnesses, transcripts and other necessary services for the defense should not decrease the Contractor's income or compensation to attorneys or other personnel; and
- (b) contracts should not, by their provisions or because of low fees or compensation to attorneys, induce an attorney to waive a client's rights for reasons not related to the client's best interest; and
- (c) contracts should not financially penalize the Contractor or individual attorneys for withdrawing from a case which poses a conflict of interest to the attorney.

Guideline III-14: Payment. The contract should provide that payments to the Contractor be made monthly or at times agreed to by the parties without regard to the number of cases closed in the period.

Guideline III-15: Financial Records. The contract shall provide that the Contractor shall retain financial records, submit financial reports, and produce an Annual financial evaluation or audit.

Guideline III-16: Supervision and Evaluation. The contract should establish a procedure for internal systematic supervision and evaluation of the performance of the Contractor's staff based upon publicized criteria. Supervision and evaluation efforts should include monitoring of time and caseload records, review and inspection of transcripts, an evaluation of attorney case activity, in-court observations, and periodic conferences. A system of performance evaluations should be based upon personal monitoring by the Contractor's Director or Chief Attorney and should be augmented by regular, formalized comments by judges, prosecutors, other defense lawyers and clients. The criteria of performance employed should be those of a skilled and knowledgeable criminal lawyer.

Guideline III-17: Professional Development. The contract should provide funds and sufficient staff-time to permit systematic and comprehensive training to attorneys and professional staff. Resources for training should be no less than is provided to prosecutors and judges in the jurisdiction, and should include continuing legal education programs, attendance at local training programs, and the opportunity to review training and professional publications and tapes. Where appropriate and where the size of the contract program requires, all attorneys should be required to attend an intensive, entry-level training program.

Guideline III-18: Standards of Recommendation. The contract shall require that the Contractor provide defense services to all clients in a professional, skilled manner consistent with minimum standards set forth by the American Bar Association, any applicable state bar association standards, the canons of ethics for attorneys in the state of the contract, and case law and applicable court rules defining the duties of counsel and the rights of defendants in criminal cases. The contract shall provide that counsel under contract shall be available to eligible defendants at their request, or the request of someone acting on their behalf, beginning at questioning, arrest, formal charging, or indictment. The Contracting Authority or the Contractor, as appropriate, shall ensure that attorneys provided by the contract shall be accessible to defendants before formal court appointment.

Guideline III-19: Confidentiality. The contract should prohibit the Contractor from releasing confidential attorney-client information or work product related to any case, except under a legal court order to do so, or after receiving a voluntary, knowing, and intelligent waiver from the client in the case, or to a subsequent

attorney on the case.

Guideline III-20: Insurance. The contract may require that the Contractor provide malpractice insurance for attorneys representing clients under terms of the contract. The contract shall not provide that the Contractor hold the government or Contracting Authority harmless for the attorneys representation of defendants.

Guideline III-21: Retention of Files. The contract shall provide that the Contractor provide for retention of client files in a manner that affords protection of the client's confidentiality interests (see Guideline III-17) for a specified period of time after the conclusion of the case at least equal to the period provided in rules governing all other lawyers' files in the jurisdiction but in no event less than five (5) years.

Guideline III-22: Management System. The contract shall provide that the Contractor shall maintain a case reporting and management information system, data from which shall be available to, or provided to, the Contracting Authority and Policy Board. Any such system shall be maintained independently from client files so as to disclose no confidential or privileged information. The case reporting and management information System shall be used to provide the Contractor, the Contracting Authority and the Policy Board with caseload information sufficient to assure compliance with Guidelines III-3, III-5, 111-14, and III-16 particularly.

Guideline III-23: Duration of Representation. The contract shall specify that the Contractor has the responsibility to complete any and all cases once representation is commenced under terms the contract. Representation commenced by the Contractor in trial court shall be continued through all trial court proceedings if provided by the contract; representation commenced by or taken to an appeal court by the Contractor shall be continued until the appeals process is terminated by an act on of the appeals court which is accepted as final on the merits by defense counsel and his or her client. Nothing in this Guideline shall prohibit a Contractor or attorney from withdrawing from a case in which a court has recognized a conflict of interest for the attorney or in which defendant is found to be ineligible for services as defined in Guideline III-3.

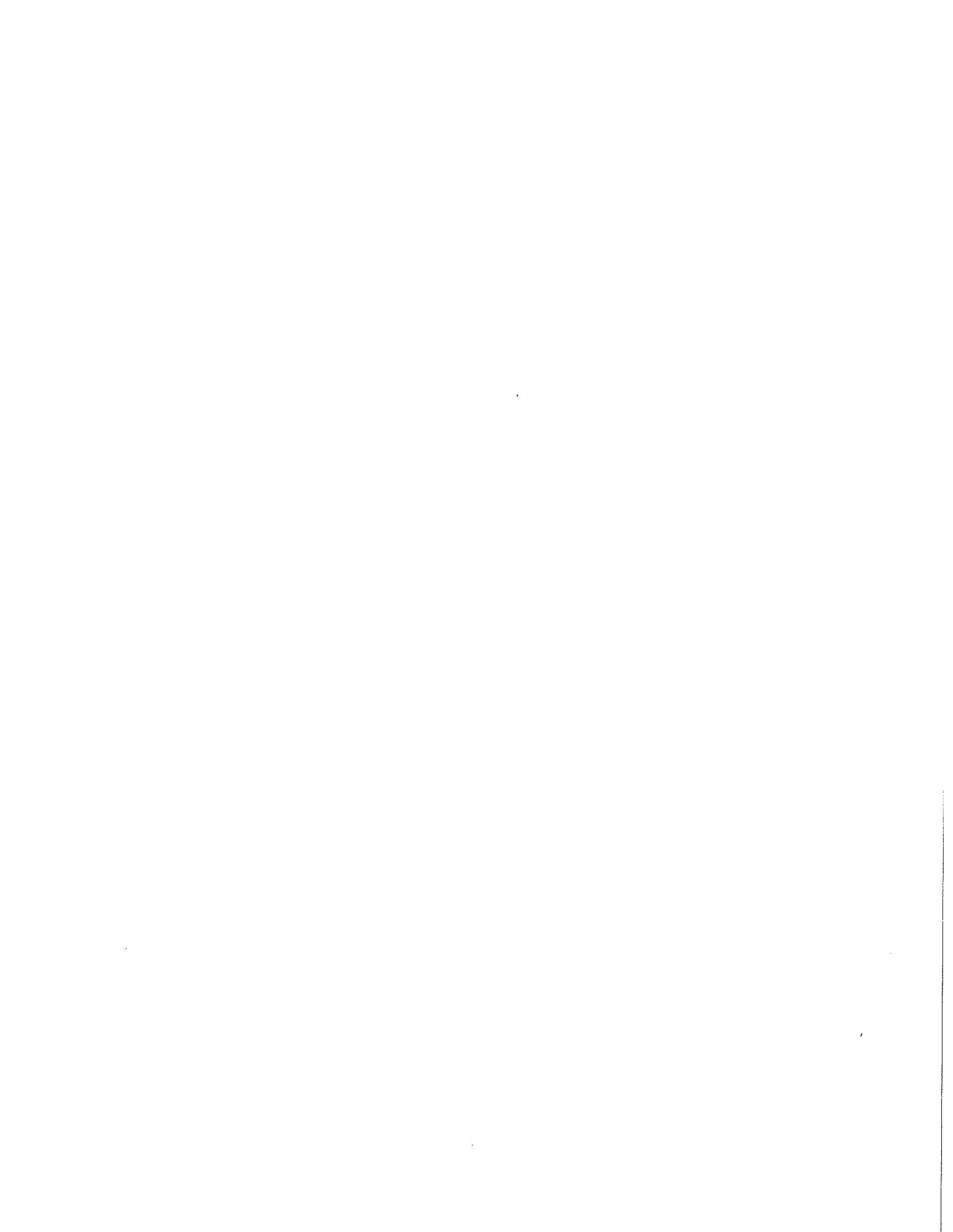
#### PART IV: CONTRACTING PROCEDURES

The following Guidelines prescribe procedures by which a contract should be prepared and state the overriding consideration to be made in awarding a contract. The Guidelines in this part are particularly relevant if contracts are to be awarded through a competitive bid process.

Guideline IV-1: Role of the Contracting Authority. The Contracting Authority in consultation with the Policy Board shall prepare, issue, and receive responses to any contracts, bids, RFPs, issued in connection with contracting for indigent defense services. Such contracts, bids and RFPs should comply with these guidelines.

Guideline IV-2: Role of the Policy Board. The Policy Board should assist the Contracting Authority in the contracting process as requested. At a minimum, the Policy Board should set minimum fees and salary levels as specified in the contract or as established after receipt of all proposals, and shall review, decided between, and recommend Contractors to the Contracting Authority.

Guideline IV-3: Awarding the Contract. The Policy Board and/or Contracting Authority should award contracts for representation for those unable to afford counsel only when Contractors have complied with these guidelines. Under no circumstances should a contract be awarded on the basis of cost alone. The Policy Board and/or Contracting Authority shall determine whether the proposed budget of a potential contractor will provide the capability of complying with these Guidelines.



OFFICE OF THE  
WISCONSIN STATE PUBLIC DEFENDER

SAMPLE CONTRACTOR CONTRACT # *[contract number]*

THIS AGREEMENT is entered into by and between the Office of the State Public Defender (hereinafter referred to as OSPD) and the Contractor identified below in IA (hereinafter referred to as "Contractor").

RECITALS

WHEREAS, the OSPD has determined that certain persons are indigent and eligible for representation under Chapter 977 Stats., and

WHEREAS, Contractor represents to possess the legal qualifications, education, and experience to represent such persons (hereinafter referred to as "clients") under Chapter 977 Stats., and

WHEREAS, Contractor is willing to provide professional legal representation to such clients in accordance with the terms and conditions hereinafter set forth.

AGREEMENT

NOW, THEREFORE, in consideration for the promises and commitments hereinafter set forth, the OSPD and Contractor hereby agree as follows:

I. SCOPE OF SERVICES

A. CONTRACTOR SPECIFICS

1. Contractor:
  - a.) Lead Attorney – *[name, social security number and State Bar number]*
  - b.) Adjunct Attorney(s) – *[names, social security numbers and State Bar numbers]*
2. Contractor Address – *[business address]*
3. County – *[contract county]*
4. Maximum Number of (M and N) Misdemeanor and Misdemeanor Traffic Cases Which May Be Appointed – *[number]*  
*(Alternatively, Maximum Number of (M) misdemeanor cases only which may be appointed) – [number]*
5. Rate of Pay Per Appointed Case – *[\$]*

- B. GENERALLY.** Contractor shall provide competent professional legal representation in accordance with chapter 977, Wis. Stats., Wis. Admin. Code PD 4, the ethical standards promulgated by the Wisconsin Supreme Court, and the standards of performance set forth by the Request for Proposals and this contract, to appointed clients, up to a maximum number of misdemeanor cases appointed to the Contractor by the OSPD, in the specific county, and at the rate per appointed case indicated herein at I.A.. Clients shall be appointed to the Contractor using an "Order Appointing Counsel" in substantially the same form as Appendix A, each of which shall, upon issuance by the OSPD, constitute appointment of a case and comprise part of this agreement.
- C. PERFORMANCE.** It is expressly understood, intended and agreed that the professional legal services provided to clients by Contractor hereunder shall meet the "Minimum Attorney Performance Standards" which are attached hereto and incorporated by reference as Appendix B.
- D. SERVICES.** For purposes of this agreement, the term "services" shall mean those legal services that, from an objective standpoint, are reasonably required for an experienced, ethical and competent attorney to provide an appropriate and effective legal defense or representation in every appointed case.
- E. CASE.** A "case" is defined as one or more charges or allegations within a proceeding brought contemporaneously against one client in a case category where the OSPD provides representation. In most situations, a case is defined by the charging document. One complaint, no matter how many charges, is defined as one case.
- F. SCOPE.** Representation commences from the time of appointment and continues through sentencing, including notice to the client of appellate rights, filing of the notice of intent to appeal when requested by the client, seeking release pending appeal in all misdemeanor jail cases, obtaining credit for jail time served, and resolution of restitution issues.
- G. CONTINUITY OF REPRESENTATION.** Contractor will ensure that each attorney under the contract represents the same client from the opening of the case through final disposition. The only exception to this policy will be where the client indicates a desire for a different attorney within the contracting group. Under no circumstances may any attorney outside the contract group be substituted without prior written approval of the OSPD.
- H. INTAKE.** Contractor, when requested, shall handle intake in the county up to four (4) hours per month per attorney. During this intake period, Contractor will be expected to accurately administer an indigency evaluation form to each person seeking or referred for Public Defender services, and to complete a case opening form for each person found eligible for such services. Contractor shall promptly submit the indigency and case opening forms to the

local OSPD, identifying any case which, in Contractor's professional opinion, would constitute a conflict pursuant to Wisconsin Supreme Court Rules should the case be appointed to him/her for representation.

- I. **CASE CLOSING.** Contractor shall, within twenty (20) working days of final disposition of a case, submit to the Assigned Counsel Division all case closing and billing information through the OSPD online billing system.
- J. **VOLUME.** No attorney within the contract group will individually handle an annual caseload under this contract greater than the ABA/NLADA standard of the equivalent of 150 felonies.
- K. **CONFIDENTIALITY.** Contractor will protect the confidentiality of attorney-client information and work product in accordance with Wisconsin Supreme Court Rules and applicable case law.
- L. **INELIGIBLE.** Contractor will contact the OSPD within forty-eight (48) hours of receipt of information which shows, or tends to show, that the client may no longer meet OSPD eligibility standards.
- M. **NUMBER OF CASES.** Contractor understands that he/she is not guaranteed appointment of the exact number of cases set forth above at I.A., but that the number represents an estimated projection based on information available as of the date of signing hereunder.

The OSPD does not guarantee any number of cases will be appointed under this contract. Availability may be affected by a variety of factors (e.g., the number of cases issued by the county district attorney, proposed legislation that would decriminalize current criminal conduct, elimination of authorization to provide representation on some case types for which the OSPD is currently authorized to provide representation, mandated higher caseloads for OSPD staff, conversion of conduct from misdemeanor to felony, and other management concerns).

The maximum number of cases set forth above in I.A. may be increased upon the mutual agreement of the parties.

- N. **WITHDRAWAL.** In the event Contractor withdraws from a case prior to the conclusion of representation, Contractor shall immediately return the case to the local OSPD office and complete the case billing and closing information using the OSPD online billing system. Compensation, if any, for a non-completed case shall be determined solely by the OSPD. As cases are counted at time of appointment toward the contract maximum stated above at I.A. cases from which Contractor withdraws may be counted toward that contract maximum. Replacement cases may be appointed.

- O. REFUSAL OF APPOINTMENT.** In the event Contractor refuses appointment of a case, that refusal may be counted as a case toward the contract maximum stated above at IA. at the sole discretion of the OSPD.
- P. REQUEST FOR PROPOSALS.** In addition to the terms expressly stated in this contract, the contents of the Request for Proposals (including attachments), RFP addenda and revisions, and the Contractor's proposal are contractual obligations.

## II. TERM

- A. PERFORMANCE.** Performance under this contract is binding upon execution commencing July 1, 2013 and ending June 30, 2014. The ending date of this contract, however, does not abrogate Contractor's duty to complete any and all cases in which representation has begun under the terms of this contract.
- B. EXTENSION.** This contract may be extended for up to three, one-year periods, with or without modifications, upon mutual agreement of the OSPD and the Contractor. However, no extension or disbursements under an extension will be made by the State of Wisconsin without approval from the Governor.

## III. CONTRACTOR PAYMENTS

- A. CONTRACTOR PAYMENTS.** Subject to the terms and conditions set forth in this agreement, the OSPD agrees to pay Contractor for services rendered at the rate set forth above at I.A. not to exceed the maximum number of cases set forth above at I.A..
- B. PAYMENT METHOD.** Payment shall be made to Contractor as follows:
1. The OSPD will make reasonable efforts to make payments to Contractor within ten (10) business days after billing and case closing information is submitted using the OSPD online billing system.
  2. Payments to Contractor shall be made payable to the Lead Attorney under his/her social security number or FEIN.
  3. Upon early termination of this agreement, the OSPD shall be liable only for the pro rata amount of the professional legal services actually performed in accordance with the terms and standards of this agreement by Contractor, through the effective date of termination, less any damages caused by the negligent or non-conforming performance of Contractor.

**C. EXCLUSIVE COMPENSATION.** No attorney representing clients under this contract may solicit or receive compensation from those clients, or on behalf of those clients, in addition to any compensation which the attorney has received or expects to receive from the OSPD, pursuant to this contract.

#### **IV. EVALUATION**

**CONTRACTOR PERFORMANCE EVALUATION.** On-going evaluation of the work performed under this contract may be conducted. Contractor agrees to cooperate with the OSPD in any evaluation or investigation, including promptly providing case information and other data upon request.

#### **V. CONTRACT COST CONSIDERATION**

**COST PER CASE.** The rate per case paid to Contractor is designed to cover all costs associated with representation of a client under the terms of this contract.

Additional payments may be made by the OSPD to Contractor for the expense of, collect calls from clients, and routine discovery and transcripts with proper receipts. Invoices with calls totaling \$50 or more must include copies of phone bills showing the calls claimed.

Contractor will be reimbursed for necessary experts, investigators, and interpreters. However, such expenses must have prior written approval by the OSPD. The OSPD reserves the right to refuse expense payment for the employment of any of the aforesaid services acquired without prior written approval of the OSPD.

#### **VI. QUALIFICATIONS OF CONTRACTOR**

**CONTRACTOR ATTORNEY QUALIFICATIONS.** Each attorney providing services under this contract must be related in the same law firm (not office sharing) and ethically obligated under SCR 20:5.1, and 20:5.2. Each contract attorney must meet all of the certification requirements contained in Wis. Admin. Code PD 1.04 for the case types covered by this contract. Each contract attorney must comply with the CLE requirements set forth by the Supreme Court and the Wisconsin State Public Defender. No reimbursement shall be provided by the OSPD for these courses.

## VII. LEAD ATTORNEY

**LEAD ATTORNEY.** Contractor hereby designates the attorney identified above at I.A. as the Lead Attorney who shall manage, supervise, and direct all attorneys furnishing professional services pursuant to this contract, in accordance with SCR 20:5.1 and 20:5.2, and to execute all writings on behalf of Contractor. The Lead Attorney shall assume responsibility for the execution and performance of all requirements under this contract and will be directly and personally responsible hereunder. All contract communications and notices hereunder shall be sent to the Lead Attorney at Contractor's business office or email address as shown in this contract at I.A.. Contractor shall keep the OSPD informed at all times of his/her correct mailing and email addresses. All contract payments shall be made to the Lead Attorney under his/her social security number or FEIN number.

## VIII. TERMINATION

This contract may be terminated by either party for any reason. The following shall justify immediate termination of the contract by the OSPD. The OSPD may impose conditions on the Contractor to continue the contract. Failure to exercise the right of termination shall not constitute waiver of such right, which may be exercised at any subsequent time.

1. The failure of Contractor to comply with any of the terms of this contract or any reasonable direction on the part of the OSPD;
2. Institution of proceedings by, or against, Contractor under the bankruptcy laws of the United States;
3. A finding by the OSPD that this contract was obtained through fraud by commission or omission;
4. Any assignment by Contractor of all or any parts of this contract without prior written approval;
5. Filing of a public complaint with the Wisconsin Supreme Court by the Office of Lawyer Regulation alleging that a contract attorney has violated a disciplinary rule;
6. The commencement of criminal prosecution of Contractor's firm or Contractor's attorneys upon evidence which gives rise to a reasonable concern for the welfare of clients or the financial welfare of the OSPD; or, a conviction of these attorneys for any misdemeanor or felony offense;
7. Loss of any Contractor attorney's license in any state for disciplinary reasons, or in Wisconsin for any reason;
8. The placement of liens or other encumbrances against the payment obligations owed to Contractor under the terms of this contract;
9. Refusal by Contractor to allow OSPD access to or copying of Contractor records or reports associated with this contract;

10. Failure of Contractor to fully, promptly and responsively cooperate with an OSPD investigation of alleged misconduct, ineffectiveness or negligence by Contractor;
11. Failure of Contractor to timely submit case-closing information;
12. Disregard by Contractor of the rights and/or best interests of the clients under this contract;
13. Conduct of the Contractor which threatens or impairs the financial integrity of the OSPD; or
14. A finding of ineffectiveness by any court applicable to any client, contract based or otherwise.

#### **IX. INDEMNIFICATION**

**SAVE HARMLESS AND INDEMNIFICATION.** Contractor shall assume the defense, including paying for all costs associated therewith, indemnify and save harmless the State of Wisconsin, the OSPD, its board members, administrators, employees and staff from all suits, actions, damages, or claims of every name, nature and description that they may be subjected to or put to by reason of claimed injury to persons, property or interests during the performance of this contract, resulting from, or alleged to have resulted from the negligence, carelessness, or willful acts of Contractor or his/her agents, servants or employees, in the performance of this contract.

#### **X. NON-ASSIGNMENT AND SUBCONTRACTING**

**NO ASSIGNMENT OR SUBCONTRACTING.** Contractor shall not assign this contract or assign responsibility or compliance with any part of this contract or assign the right to receive payment under this contract to anyone without the prior written consent of the OSPD.

#### **XI. INDEPENDENT CONTRACTOR**

**CONTRACTOR AS INDEPENDENT CONTRACTOR.** The contract group, as individual attorneys and as a whole, are at all times deemed to be independent contractors. This contract does not in any way create the relationship of attorney and client or employee and employer, either between Contractor and the State of Wisconsin, or between Contractor and the OSPD. Contractor exclusively assumes the responsibility for the acts of his/her associates and employees as they relate to services provided during the course and scope of this contract. Contractor shall defend and hold the OSPD, and individuals associated therewith, harmless against any claims to the contrary.

## XII. CONTRACT DISPUTES

All disputes between the Contractor and the OSPD pertaining to the terms of this contract shall be resolved according to the following procedure:

- A. Claim of Dispute:** The Contractor may request resolution of any dispute pertaining to the terms of this contract by filing a Claim of Dispute (“Claim”) with the Director of the Assigned Counsel Division (“Director”) within thirty (30) days after the dispute arises. The Claim must be in writing and contain a concise statement of the matter in controversy together with any existing supporting documentation. The Director shall issue an answer to the Claim within thirty (30) days of its receipt. Submission of a Claim to the Director is a prerequisite to resolution by appeal to the State Public Defender.
- B. Appeal to the State Public Defender:** If the Contractor is not satisfied with the answer issued by the Director, the Contractor may file an appeal with the State Public Defender. The appeal must be in writing and received by the State Public Defender no later than fifteen (15) days from the issuance of the Director’s answer. The State Public Defender or his/her designee shall issue a decision within fifteen (15) days of receipt of the appeal. Appeal to the State Public Defender is a prerequisite to resolution by arbitration.
- C. Arbitration:** If the Contractor is not satisfied with the decision issued by the State Public Defender, the matter in controversy may be submitted to arbitration as set forth below and pursuant to the Wisconsin Arbitration Act:

  - 1. Written Demand.** The Contractor may make a demand for arbitration by filing such a demand, in writing, to the Director. The demand shall be made within fifteen (15) days of the date of issuance of the State Public Defender’s decision on appeal. The Claim’s original statement of the matter in controversy with supporting documentation shall constitute the entire subject matter to be heard by the arbitrator, unless the parties agree to modify the scope of the issue at the hearing.
  - 2. Selection of Arbitrator(s).** The arbitrator shall be an attorney selected by the OSPD. The arbitrator shall not be on the current OSPD certification lists or part of a firm with attorneys on the current OSPD certification lists. The Contractor may reject one such selection of an arbitrator by filing a written rejection notice with the Director within ten (10) days of the date of issuance of the notice of arbitrator selection.
  - 3. Expenses.** The parties to the arbitration shall each bear their own expenses in the arbitration for their respective attorney’s fees, witnesses and related expenses.
  - 4. Cost and Fees.** The losing party shall pay administrative costs and arbitrator fees, unless otherwise divided or awarded by the arbitrator. If, in the arbitrator’s judgement, it is deemed more equitable to divide

the arbitration costs and fees between the parties, the arbitrator shall determine in what portion against each party such costs and fees shall be assessed.

5. **Binding Effect.** Any award rendered in arbitration shall be final and binding on each of the parties and judgement may be entered in any court having jurisdiction.

### **XIII. PRIVATE PRACTICE**

**PRIVATE PRACTICE OF LAW.** Neither Contractor, nor the named attorneys under this contract, shall be prohibited from engaging in the private practice of law, including the handling of criminal cases.

### **XIV. TIME SHEETS AND RECORDS**

**A. TIME AND EXPENSE REPORTS.** Contractor shall prepare, and maintain contemporaneous time records and expense documentation for each case appointed to him/her by the OSPD. Time records may be prepared and maintained using the OSPD online billing system. The information to be maintained must include:

1. The date on which legal services were provided;
2. The time actually spent in performing such legal services, calculated to the nearest tenth of an hour;
3. The name of the attorney who actually performed such legal services;
4. With respect to legal research, the specific issues researched;
5. The reason and length of time for every in-court appearance; and
6. Unusual costs incurred in the case, such as, investigator, expert or unusual travel expenses.

**CONTRACTOR RECORDS.** Contractor shall also make available for inspection and copying: pleadings, briefs (unless confidential by statute), time records, expense records and other documents relating to an appointed case. Contractor shall keep and retain such records for a period of at least seven (7) years following the conclusion of an appointed case. Failure to produce such records for inspection and copying by the OSPD may result in forfeiture of Contractor's right to payment under this contract and cancellation of the contract.

### **XV. AUDITS**

**AUDIT BY OSPD.** All records required by this contract are subject to inspection from time to time by the local OSPD office personnel or an Assigned Counsel

Division representative. The OSPD may approve or reject a bill in whole or in part if the records are incomplete, inaccurate, fraudulent, lack necessary documentation, or do not support Contractor billings.

## **XVI. WARRANTIES AND REPRESENTATIONS**

By signing this contract, Contractor hereby warrants and represents that:

1. After reasonable inquiry, Contractor is not aware of any conflict of interest within the meaning of SCR 20:1.7, 20:1.8, 20:1.9 or 20:1.10 that would preclude Contractor from providing the professional legal services to clients appointed under this agreement;
2. Neither a state public official, as defined in §19.42(14), Stats., nor an organization in which a state public official or a member of that official's immediate family owns or controls a ten (10%) percent interest, is a party to this contract; and
3. If a state public official, as defined in §19.42(14), Stats., or an organization in which a state public official or a member of that official's immediate family owns or controls a ten (10%) percent interest, is a party to this contract, then, this contract shall be voidable by the State and any amounts paid hereunder may be recovered as provided in §16.77(2), Stats. and Wis. Admin. Code ADM 10.10(5), unless appropriate disclosure is made to the State of Wisconsin Ethics Board.

## **XVII. AFFIRMATIVE ACTION REQUIREMENTS**

- A. NONDISCRIMINATION.** In connection with the performance of work under this contract, Contractor and his/her law firm agree not to discriminate against any employee or applicant for employment because of age, race, religion, color, handicap, gender, physical condition, developmental disability as defined in §51.01(5), Stats., sexual orientation or national origin. This provision shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. Except with respect to sexual orientation, Contractor, and his/her law firm, further agree to take affirmative action to ensure equal employment opportunities. Contractor agrees to post in conspicuous places, available for employees and applicants for employment, notices setting forth the provisions of the nondiscrimination clause.
- B. AFFIRMATIVE ACTION EFFORTS.** Contractor, and his or her law firm, agree to make every reasonable effort to: (1) develop a balanced work force that includes women, minorities, individuals with disabilities, and other persons in protected classifications employed by the Contractor that is

proportional to the percentage of women, minorities, individuals with disabilities and other persons in protected classifications in the relevant labor market based upon data prepared by an appropriate governmental entity; (2) in the absence of reliable government data, ensure that at least two (2) percent of the work force includes qualified individuals in protected classifications; and (3) avoid allocating the work force in a manner which circumvents the intent of this subparagraph. If this contract is for twenty-five thousand dollars (\$25,000) or more, and the annual work force is ten or greater, within fifteen (15) days of the date of this contract, the Contractor and his/her law firm shall submit to the OSPD a written affirmative action plan.

#### **XVIII. ENTIRE AGREEMENT**

This contract contains the entire agreement of the parties. Any amendment, modification or alteration hereto must be in writing signed by both parties.

#### **XIX. CHOICE OF LAW; SAVINGS CLAUSE**

This agreement shall be governed by and construed in accordance with the laws of the State of Wisconsin, including, without limitation, Chapter 977, Stats., Wis. Admin. Code PD 4, and Supreme Court Rules governing the ethical conduct of licensed attorneys. If any provisions of this agreement are determined to be prohibited by or invalid under Wisconsin law, such provisions shall be ineffective only to the extent of such prohibition or invalidity, without affecting the validity or enforceability of the remaining provisions of this agreement.

#### **XX. VENUE AND JURISDICTION**

**VENUE, JURISDICTION.** Any action relating to the construction, interpretation, enforcement or recovery of amounts owed under this agreement shall be brought and venued in the Dane County Circuit Court in Madison, Wisconsin; provided, that nothing herein shall be construed to waive any sovereign immunity or other defenses that the OSPD may have under applicable Wisconsin law. Contractor hereby consents to personal jurisdiction in the Dane County Circuit Court, and waives any jurisdictional defense that Contractor otherwise might have relating thereto.

#### **XXI. EFFECTIVE DATE**

**EFFECTIVE DATE.** This agreement shall become effective immediately upon acceptance and execution by the OSPD. It is expressly understood between parties to this that terms hereof are not in full force and effect until written

gubernatorial approval has been executed. No work may proceed prior to the Governor's approval.

**XXII. REPRESENTATIVE CAPACITY**

It is understood, intended and agreed that the OSPD, as an agency, is executing this agreement as an agent and representative of the State of Wisconsin and assumes no direct personal liability hereunder.

**XXIII. CAPTIONS**

The captions in this agreement are for convenience of reference only and shall not define or limit any of the terms and conditions set forth herein.

**IN WITNESS WHEREOF**, the parties have executed this agreement as of the first date set forth above.

OFFICE OF THE WISCONSIN STATE PUBLIC DEFENDER

BY: \_\_\_\_\_  
STATE PUBLIC DEFENDER OR DESIGNEE

DATE: \_\_\_\_\_

CONTRACTOR

BY: \_\_\_\_\_  
Lead Attorney *[name]*

DATE: \_\_\_\_\_

Approved Pursuant to Section 20.930, Wisconsin Statutes

\_\_\_\_\_  
Governor or Governor's Designee